APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968 1969

No. 528 ✓ 9

NACIREMA OPERATING CO., INC., *et al.*,
Petitioners,

—v.—

WILLIAM H. JOHNSON, *et al.*,
Respondents.

No. 663 ✓ 16

JOHN P. TRAYNOR AND JERRY C. OOSTING,
DEPUTY COMMISSIONERS,
Petitioners,

—v.—

WILLIAM H. JOHNSON, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 528 PETITION FOR CERTIORARI FILED SEPTEMBER, 16, 1968

NO. 663 PETITION FOR CERTIORARI FILED OCTOBER 17, 1968
CERTIORARI GRANTED DECEMBER 9, 1968

TABLE OF CONTENTS

DOCKET ENTRIES BELOW

United States District Courts

Date	Filings — Proceedings
June 25, 1964	Complaint[s], filed. [Appeals from orders of Deputy Commissioner Traynor in Johnson case (D. Md. Admiralty No. 4704); and Klosek case (D. Md. Admiralty No. 4705).]
February 19, 1965	Complaint filed. [Appeal from order of Deputy Commissioner Oosting in Avery case (E. D. Va. Civil Action No. 4976).]

United States Court of Appeals for the Fourth Circuit

[The following entries pertain to the Avery case, No. 10,323. For each entry below, the same transaction occurred in the Johnson case, No. 10,298, and in the Klosek case, No. 10,299, on the same date as indicated for the Avery case. The substantially similar entries for the Johnson and Klosek cases are omitted as surplusage.]

February 9, 1966, (February Session, 1966) cause came on to be heard before Haynsworth, Chief Judge, Sobeloff, Circuit Judge, and Hutcheson, District Judge; and was argued and submitted. [Johnson and Klosek cases were argued before the same panel on the same date.]

November 6, 1967, order setting down case for reargument en banc at February 1968 session and setting dates for the filing of supplemental briefs and appendices for the respective parties filed. Joint with 10,060 [Vann case for which no application for certiorari was filed], 10,298 [Johnson case] and 10,299 [Klosek case].

February 5, 1968, (February Session, 1968) cause came on to be heard before Haynsworth, Chief Judge, and Sobe-

loff, Boreman, Bryan, Winter, Craven and Butzner, Circuit Judges, sitting en banc, and was reargued by counsel and submitted.

June 20, 1968, opinion[s] filed.

June 20, 1968, judgment[s] of District Court reversed and cause remanded. Judgment[s] filed.

July 12, 1968, order[s] staying mandate pending certiorari filed. Joint with Nos. 10,060, 10,298 and 10,299.

COMPENSATION ORDER OF DEPUTY COMMISSIONER JOHN P. TRAYNOR, FILED AT BALTIMORE, MARYLAND, JUNE 8, 1964.

[R. Vol. I, pp. 29-32.]

U. S. Department of Labor
Bureau of Employees' Compensation
Fourth Compensation District

Case No. 1236-1270

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act.

William H. Johnson,
Claimant,

v.

Nacirema Operating Co., Inc.,
Employer,
The Travelers Insurance Co.,
Insurance Carrier.

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hear-

ing having been duly held in accordance with law, and supplemental legal briefs having been submitted by both parties as an addendum to legal briefs submitted at the hearing, the Deputy Commissioner makes the following:

Findings of Fact

That on the 14th day of November 1963 the claimant above named was in the employ of the employer above named at Baltimore, in the State of Maryland, in the Fourth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by The Travelers Insurance Co.; that the employer herein on the date of injury had other employees engaged in maritime employment; that on said day the claimant herein was employed by the employer herein, and was while performing such employment assigned to and stationed in a gondola type railroad car, where he was engaged in hooking up approximately ten ton drafts of steel beams, which drafts were being hoisted from the gondola type railroad car by means of a ship's crane, which crane was located on the vessel SS "Bethtex", which vessel was afloat in the Patapsco River at Sparrows Point, Maryland; that while thus engaged in hooking up drafts of steel a draft of steel claimant had hooked up swung back while it was being hoisted by the ship's crane and struck the claimant, pinning him against side of gondola car; that as a result of being struck by the draft of steel and being pinned against the gondola the claimant sustained serious injury resulting in his disability; that the pier on which the injury took place is a structure permanently affixed to the land at its northernmost end; that the surface of the pier extends over the waters of the Patapsco River in a southerly direction; that the pier is approximately six hundred feet long; that the pier's surface itself consists of three sets of railroad tracks on each side, which are extensions of track originating in the railroad shifting yard of the adjacent Bethlehem Steel properties; that there is a fifty foot center strip on the pier's surface,

which is covered by steel plating; that the pier due to its affixation and connection to the land is an extension of the land; that the vessel SS "Bethtex" at the time of the injury was docked stern in on the east side of the pier; that the gondola car in which claimant was working at the time of his injury was situated parallel to and alongside the vessel; that the gondola car was sixty feet in length, ten feet in width and nine feet in height; that written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by failure to receive such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of said Act; that the incident of 14 November 1963 had its inception and culmination on the surface of the pier; that the surface of the pier is situated over the navigable waters known as the Patapsco River; that the incident of 14 November 1963 does not constitute "an injury occurring upon the navigable waters of the United States including any dry dock" (Section 3(a));

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim for compensation benefits be, and it hereby is rejected for the following reasons: that the claimant's employment on 14 November 1963 was not upon the navigable waters of the United States (including any dry dock), nor did the injury that he sustained on that date occur upon the navigable waters of the United States (including any dry dock).

Given under my hand and filed at Baltimore, Maryland, this 8th day of June 1964.

JOHN P. TRAYNOR,

Deputy Commissioner,

Fourth Compensation District.

COMPENSATION ORDER OF DEPUTY COMMISSIONER JOHN P. TRAYNOR, FILED AT BALTIMORE, MARYLAND, JUNE 8, 1964.

[R. Vol. I, pp. 36-39.]

U. S. Department of Labor
Bureau of Employees' Compensation
Fourth Compensation District

Case No. 1236-1269

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Julia T. Klosek, widow of Joseph J. Klosek, deceased employee,
Claimant,

v.

Nacirema Operating Co., Inc.,
Employer,
The Travelers Insurance Co.,
Insurance Carrier.

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in accordance with law, and supplemental legal briefs having been submitted by both parties as an addendum to legal briefs submitted at the hearing, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 14th day of November 1963 the decedent employee above named was in the employ of the employer above named at Baltimore, in the State of Maryland, in the Fourth Compensation District established under the

provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by The Travelers Insurance Co.; that the employer herein on the date of injury had other employees engaged in maritime employment; that on said day the decedent herein was employed by the employer herein, and was while performing such employment assigned to and stationed in a gondola type railroad car, where he was engaged in hooking up approximately ten ton drafts of steel beams, which drafts were being hoisted from the gondola type railroad car by means of a ship's crane, which crane was located on the vessel SS "Bethtex", which vessel was afloat in the Patapsco River at Sparrows Point, Maryland; that while thus engaged in hooking up drafts of steel a draft of steel decedent had hooked up swung back while it was being hoisted by the ship's crane and struck decedent and propelled him head first out of the gondola car onto the pier; that as a result of the injury sustained through being struck by the draft of steel and being propelled onto the pier decedent expired on 14 November 1963, shortly after such injury; that the pier on which the fatal injury took place is a structure permanently affixed to the land at its northernmost end; that the surface of the pier extends over the waters of the Patapsco River in a southerly direction; that the pier is approximately six hundred feet long; that the pier's surface itself consists of three sets of railroad tracks on each side, which are extensions of track originating in the railroad shifting yard of the adjacent Bethlehem Steel properties; that there is a fifty foot center strip on the pier's surface, which is covered by steel plating; that the pier due to its affixation and connection to the land is an extension of the land; that the vessel SS "Bethtex" at the time of the injury was docked stern in on the east side of the pier; that the gondola car in which decedent was working at the time of his fatal injury was situated parallel to and alongside the vessel; that the gondola car was sixty feet in length, ten feet in width and nine feet in height; that written notice of injury and death was not given to the employer within thirty days, but that the employer had knowledge of the injury and death and has not been preju-

diced by failure to receive such written notice; that the employer furnished the deceased with medical treatment, etc., in accordance with Section 7(a) of the said Act; that Julia T. Klosek, born 7 October 1914 and married to the deceased on 10 November 1940, is the surviving wife of the deceased; that the decedent's widow, Julia T. Klosek, filed timely claim against the employer for death benefits under the Longshoremen's and Harbor Workers' Compensation Act on her own behalf and on behalf of the three minor children of the decedent herein; that Victor Henry, born 31 March 1947, Rose Veronica, born 11 March 1950, and Judy Ann, born 30 July 1955, are the minor children of the claimant; that the incident of 14 November 1963 had its inception and culmination on the surface of the pier; that the surface of the pier is situated over the navigable waters known as the Patapsco River; that the incident of 14 November 1963 does not constitute "an injury occurring upon the navigable waters of the United States including any dry dock" (Section 3(a));

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim for death benefits be, and it hereby is rejected for the following reasons: that the decedent's employment on 14 November 1963 was not upon the navigable waters of the United States (including any dry dock), nor did the injury that he sustained on that date occur upon the navigable waters of the United States (including any dry dock).

Given under my hand and filed at Baltimore, Maryland, this 8th day of June 1964.

JOHN P. TRAYNOR,
Deputy Commissioner,
Fourth Compensation District.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE DEPUTY COMMISSIONER, DECEMBER 29, 1964

[R. Vol. II, pp. 24, 25]

(Mr. Rabinowitz) I would call Mr. George Bailey as my first witness.

(Mr. Eley) Mr. Commissioner, we could stipulate to a great deal of this testimony.

I don't think the facts are essentially in dispute about where the accident happened, or gears.

(Off the record.)

(The Commissioner) Let the record show [Vol. II, p. 25] we went off the record so parties could stipulate as to the facts of the injury.

(Mr. Rabinowitz) Mr. Eley and I have stipulated the facts to be as follows: that the Claimant, Mr. Avery, was in a railroad car on Pier B on December 28, 1961, a ship was beside Pier B, logs were being loaded onto the ship from the railroad car, that while a log was being lifted from the railroad car by means of the ship's gear, that Claimant was struck by a log or logs while the log or logs were attached to the ship's gear, and he was crushed against the side of the railroad car, the railroad car was on the pier itself, and the pier itself was over the water, but the end of the pier was attached to the land.

(Mr. Eley) So stipulated.

(Mr. Benson) So stipulated.

(The Commissioner) That takes care of the facts of the injury.

* * * *

[Vol. II, pp. 26, 27]

(The Commissioner) Well, it is a regular pier then. I understand it is over the waters?

(Mr. Benson) Right.

(The Commissioner) And it extends into the Elizabeth River for some distance?

(Mr. Rabinowitz) Yes, sir.

(Mr. Benson) As much as 2 ships can berth, say 1000 feet for the union's side, 2 ships can berth at either of those [Vol. II, p. 27] piers extending into the Elizabeth River.

Those ships usually are from 500 to 600 feet long, and that makes the distance extending around from 1000 to 1200 feet in the navigable waters of the Elizabeth River.

* * * *

[Vol. II, p. 27]

(The Commissioner) We are getting quite a bit of information. I don't know that all is factual, but I think we have sufficient information to show that the pier extends over navigable waters.

(Mr. Eley) We will stipulate to that part.

* * * *

COMPENSATION ORDER OF DEPUTY COMMISSIONER JERRY C. OOSTING, FILED AT NORFOLK, VIRGINIA, FEBRUARY 10, 1965.

[R. Vol. II, pp. 6-9.]

United States Department of Labor
Bureau of Employees' Compensation
Fifth Compensation District

Case No. 2-2831

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Albert Avery,
Claimant,

v.

Old Dominion Stevedoring Corporation,
Employer,

Liberty Mutual Insurance Company,
Insurance Carrier.

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hear-

ing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

That on the 28th day of December 1961 the claimant above named was in the employ of the employer above named at Norfolk, in the State of Virginia, in the Fifth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Liberty Mutual Insurance Company; that on said day the claimant was employed as a longshoreman for the employer and assigned with other members of the work gang to an open type railroad car where they were engaged in hooking up logs, such logs being hoisted from the railroad car by means of ship's gear and loaded onto the ship, which vessel was afloat in the Elizabeth River, Norfolk, Virginia; that while a log was being lifted from the railroad car by means of the ship's gear, the claimant was struck by a log or logs while the log or logs were attached to the ship's gear crushing him against the side of the railroad car, resulting in fracture of transverse processes of lumbar vertebrae and internal injuries; that the railroad car on which the injury was sustained was on Pier B, City Piers; that the pier is the traditional or usual type structure existing in the Norfolk area; that the pier is attached to the land at one end and it juts outward and over the waters of the Elizabeth River; that the injury had its inception and culmination on the railroad car which was on the surface of the pier; that the pier due to its connection to the land is an extension of the land; that written notice of injury was not given within thirty days but that the employer had knowledge of the injury and has not been prejudiced by failure to receive such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of the Act; that the average weekly wage of the claimant at the time of his injury was $68.07; that the accident of 28 December 1961 does not constitute an injury occurring upon the navigable waters of the United States (including any dry dock) and is excluded

under the provisions of Section 3(a) of the Act; that the Industrial Commission of Virginia, pursuant to the terms of the Workmen's Compensation Law of Virginia, awarded compensation to the claimant at the rate of $32.40 per week for the period from 28 December 1961 to 12 July 1962.

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim be and it is hereby REJECTED for the reason that the injury sustained by the claimant on 28 December 1961 did not occur upon the navigable waters of the United States (including any dry dock) within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand and filed at Norfolk, Virginia this 10th day of February 1965.

JERRY C. OOSTING,
Deputy Commissioner,
Fifth Compensation District.

OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED AND ENTERED JUNE 22, 1965, REPORTED AT 243 F. SUPP. 184, 1965 A.M.C. 1825.

[R. Vol. I, pp. 146-175]

In the United States District Court for the
District of Maryland

Admiralty No. 4704

William H. Johnson

v.

John P. Traynor, Deputy Commissioner,
United States Department of Labor

and

Nacirema Operating Company, Inc.,
a body corporate.

Admiralty No. 4705

Julia T. Klosek, widow of Joseph J. Klosek, deceased employee

v.

John P. Traynor, Deputy Commissioner, United States Department of Labor

and

Nacirema Operating Company, Inc., a body corporate.

(Filed: June 22, 1965.)

John J. O'Connor, Jr., O'Connor and Preston, Baltimore, Maryland, for complainants.

Randall C. Coleman and Thomas W. Jamison, III, Baltimore, Maryland, for respondent Nacirema Operating Company, Inc.; Thomas J. Kenney, United States Attorney and Joseph H. H. Kaplan, Baltimore, Maryland, for Deputy Commissioner.

R. DORSEY WATKINS, District Judge:

These companion proceedings were brought by William H. Johnson, injured longshoreman, and Julia T. Klosek, widow of Joseph J. Klosek, deceased longshoreman, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., section 901 et seq. (the Longshoremen's Act) to review and set aside, as not in accordance with law, compensation orders filed by John P. Traynor, Deputy Commissioner, United States Department of Labor, denying compensation benefits under the act to the claimants. The factual background giving rise to each claim is identical, the same legal question is presented as to each claim and counsel for the respective parties are the same in each case. Accordingly, the Deputy Commissioner held a combined hearing on both claims and

in this court likewise the proceedings for review in both cases have been combined.

The facts as found by the Deputy Commissioner are not in dispute. On November 14, 1963 Johnson and Klosek, longshoremen and employees of the Nacirema Operating Company, Inc., were engaged in loading the S.S. Bethtex, a vessel afloat in the navigable waters of the Patapsco River at Sparrows Point, Maryland. Both men were assigned to and stationed in a gondola type railroad car which was sixty feet in length, ten feet in width and nine feet in height and was positioned on railroad tracks on the High Pier at the Bethlehem Steel Plant at Sparrows Point. The longshoremen were engaged in hooking up approximately ten ton drafts of steel beams which were then hoisted from the railroad car by use of a crane located on the S.S. Bethtex. One such draft while being lifted into a hold of the vessel swung back, struck Klosek and propelled him head first out of the gondola onto the pier, fatally injuring him. Johnson was pinned by the same draft against the side of the gondola car and suffered serious injuries. The pier on which the accident took place is permanently affixed to the land at its northernmost end. Its surface extends over the waters of the Patapsco River in a southerly direction. The pier is approximately six hundred feet long and its surface consists of three sets of railroad tracks on each side, which tracks are extensions of tracks originating in the railroad shifting yard of the adjacent Bethlehem Steel properties. There is a fifty foot center strip on the pier which is covered by steel plating. At the time of the injury the "S.S. Bethtex" was docked stern in on the east side of the pier. The gondola car in which the decedent and injured claimant were working was situated parallel to and alongside the vessel on the third railroad track.

Claims were filed on behalf of both claimants under the Maryland Workmen's Compensation Act. (Article 101, section 1 et seq., Annotated Code of Public General Laws of Maryland, 1957 Edition.) Johnson has been paid in accordance with the Maryland State Workmen's Compensa-

tion Act schedule and although Mrs. Klosek has apparently not as yet received any benefits, her claim has not been contested by Nacirema Operating Company or its insurance carrier and the court is advised that it is anticipated that compensation will be forthcoming under the Maryland Act.

In addition Johnson and Mrs. Klosek submitted timely claims against Nacirema Operating Company under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901 et seq.; he for temporary and permanent disability and she for death benefits. Answers were filed on behalf of the employer and insurance carrier raising, among other defenses, lack of jurisdiction over the subject matter of the compensation claims. The hearing before the Deputy Commissioner was limited to the question of jurisdiction and it is the sole issue before this court. The Deputy Commissioner rejected both claims for compensation on the ground that the disability of Johnson and the death of Klosek did not result "from an injury occurring *upon the navigable waters* of the United States (including any dry dock)", emphasis supplied, as that jurisdictional prerequisite for the applicability of, and for coverage under, the provisions of the Longshoremen's and Harbor Workers' Compensation Act has been interpreted by the courts.

Section 903(a) of Title 33, U.S.C.A., entitled "Coverage" provides, in pertinent part:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Claimants urge two grounds for finding them within the coverage of the Act:

(1) That in simple fact both wharves and ships are upon the water and that accordingly there should be no differ-

ence in the result as to coverage between injuries occurring on a wharf or pier over and upon navigable waters and injuries occurring on a deck of a vessel over and upon navigable waters and (2) that in any event the Extension of Admiralty Jurisdiction Act of 1948 (46 U.S.C.A. 740) by embracing within the admiralty and maritime jurisdiction of the United States Courts certain shoreside injuries has likewise extended the coverage of the Longshoremen's and Harbor Workers' Compensation Act to injuries occurring on land. The court will consider these two contentions in turn.

(1) It has been uniformly held that structures such as wharves, piers, etc., affixed permanently to shore and bed, are extensions of land, remedies for injuries upon which are restricted to those afforded by local rather than admiralty law. (Swanson v. Marra Brothers, 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; State Industrial Commission v. Nordenholt Corp., 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; American Export Lines, Inc. v. Revel, 4 Cir. 1959, 266 F. 2d 82, 84; see also: Hastings v. Mann, 4 Cir. 1965, 340 F. 2d 910, 911-912; Benedict on Admiralty, section 29, page 64, 6th Edition; Gilmore & Black, The Law of Admiralty, section 6-46, page 339, 1957 Edition; and Robinson on Admiralty, section 11, page 81, 1939 Edition.) In the Nordenholt case, decided prior to the enactment of the Longshoremen's Act, the Supreme Court of the United States clearly held that an injury incurred by a longshoreman who, while engaged in unloading a vessel lying in navigable waters, slipped and fell on the "dock"[1] was a land injury and, therefore, that recovery for such an injury was governed by the local state workmen's compensation act and not by general maritime law. After the enactment of the Longshoremen's Act the Supreme Court of the

[1] Webster's Third New International Dictionary, Unabridged, recognizes that the meaning of the word "dock" is not restricted to "a waterway extending between two piers or projecting wharves or cut into land for the reception of ships" (4 dock 1 C) but may also properly be used to describe a structure built on pilings such as a wharf or pier (4 dock 2 A), the word being used in the latter sense in the Nordenholt case.

United States reaffirmed the princple set out in the Nordenholt case and adhered to it without deviation in the Swanson case. Swanson, a longshoreman, while on a pier and while engaged in loading cargo on a vessel lying alongside, was injured when a life raft fell from the vessel and struck him. The specific question before the court was whether or not the longshoreman had a right of action against his employer, a stevedoring company, under the Jones Act while working on shore. The court clearly treated the stevedore's injury as a land injury and in interpreting the inter-relationship of the Longshoremen's Act and the Jones Act stated:

> "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty case[2] only such rights to compensation as are given by the *Longshoremen's Act*. But since this act is restricted to compensation for injuries occurring on navigable waters, it *excludes* from its own terms and from the Jones Act *any remedies* against the employer *for injuries inflicted on shore*. The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel." (Swanson v. Marra Bros., 1946, 328 U.S. 1, 7, emphasis supplied.)

Eleven years after the enactment of the Extension of Admiralty Jurisdiction Act of 1948, the United States Court

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[2] In International Stevedoring Company v. Haverty, 1926, 272 U.S. 50, 47 S. Ct. 19, 171 L. Ed. 157, a longshoreman, who was injured while stowing cargo and while on but not employed by a vessel lying in navigable waters, was allowed to bring suit under the Jones Act against his stevedore company employer to recover for injuries allegedly caused by the employer's negligence. This decision was, of course, rendered prior to the enactment of the Longshoremen's Act, which now provides the "exclusive" right of recovery of the longshoreman against his employer.

of Appeals for the Fourth Circuit clearly and unmistakably stated in the Revel case that the Nordenholt-Swanson principle was still the law. Revel, a stevedore, was working on the pier alongside a hold preparing cargo to be hoisted onto the vessel and stowed in the hold. A pallet load of drums, part of the cargo being hoisted, fell onto the pier injuring him. He thereafter received and accepted compensation in accordance with the local state workmen's compensation act. Subsequently, he brought suit, to recover damages for his personal injuries, against the owner of the vessel which he had been helping to load at the time of the accident. On appeal, in analyzing the injured longshoreman's right of recovery as against his stevedoring company employer the United States Court of Appeals for the Fourth Circuit said:

> "Since Revel was injured while standing on the dock (an extension of the land), his remedies are restricted to those afforded by the local law. Swanson v. Marra Bros., 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; State Industrial Comm. v. Nordenholt Corp., 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; . . ." (American Export Lines, Inc. v. Revel, 4 Cir. 1959, 226 F. 2d 82, 84.)

In contrast to the myriad of cases holding that wharves, pilings, piers and like structures are extensions of land,[3] not one case has been cited by the claimants holding, or even suggesting, that a pier or similar structure could be considered not as being an extension of land but rather as being upon navigable waters. Accordingly, this court holds

[3] See in addition to those previously cited: Cleveland Terminal Railroad Company v. Cleveland Steamship Company, 1908, 208 U.S. 316, 28 S. Ct. 414, 52 L. Ed. 508; Smith & Son v. Taylor, 1928, 276 U.S. 179, 48 S. Ct. 228, 72 L. Ed. 520; Johnson v. Marshall, 9 Cir. 1942, 128 F. 2d 13, cert. den. 1942, 317 U.S. 629, 63 S. Ct. 44, 87 L. Ed. 508; Kent v. Shell Oil Co., 5 Cir. 1961, 286 F. 2d 746; Connor v. United States, et al., D.C. E.D. Pa. 1949, 87 F. Supp. 847; and the recent cases of Gutierrez v. Waterman Steamship Corp., 1963, 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297; Hagans v. Ellerman and Bucknall Steamship Company, 3 Cir. 1963, 318 F. 2d 563, 582.

that the High Pier at the Bethlehem Steel Plant at Sparrows Point is an extension of land and that the death and injury occurring thereon did not occur "upon the navigable waters of the United States."

(2) The claimants thus fall back on their argument that the Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C.A., section 470, by embracing within the admiralty and maritime jurisdiction of the United States certain shoreside injuries, in effect amended the coverage provision of the Longshoremen's and Harbor Workers' Compensation Act and extended coverage under the latter act to certain types of land injuries. For claimants to prevail an amendment must be shown because it is clear that, when the Longshoremen's Act was initially passed in 1927, Congress did not intend to extend coverage to land injuries although it had been urged to. One writer stated the problem in 1926 as follows:

> "The fact that admiralty has never assumed jurisdiction over longshoremen while on the dock (*Nordenholt* case) indicates definitely that, so far as the courts are concerned, the work of loading and unloading vessels will continue to be a divided process as regards work on and off the vessel, unless legislation intervenes. * * * the only inclusive method remaining is for Congress to assume jurisdiction over the entire subject, either as elements in the performance of maritime contracts or by virtue of its power under the commerce clause of the Constitution." (Clark, "The Longshoreman and Accident Compensation", 22 Monthly Labor Review (April 1926), pages 5 and 18.)

Much of the testimony before the Senate urged that the coverage provisions of the bill extend to land injuries as well as injuries upon navigable waters. Mr. William F. Dempsey, representing the International Longshoremen's Association, declared that the bill should be drafted to cover a longshoreman even were he injured on the dock:

> "If he is working in maritime employment it is the same whether on the docks or on board ship, because

> the cargo has to be assembled on the dock and handled there in order to go on board ship." (Senate Hearings, pages 26 to 27.)

Mr. Lindley D. Clark, for the Bureau of Labor Statistics, pointed out that Congress in enacting this legislation could rely for its authority not only upon the admiralty and maritime power but also upon the commerce clause of the Constitution:

> "There is control of the whole contract of loading, unloading, work on the dock, on the bridge, and on the ship, and it is the earnest desire of Commissioner Stewart that a bill should cover the contract, cover the job and not simply the man when he is on the ship." (Senate Hearings, page 40.)

The "earnest desire" of the Commissioner was not realized. The act as finally passed blended the two traditional bases of admiralty jurisdiction, contract (the existence of the employment relationship) and tort (the situs of the injury), and as to this latter element, the only one at issue in the instant proceedings, adopted the familiar admiralty rule for jurisdiction over torts — occurrence upon navigable waters. The line had to be, and has to be, drawn somewhere. Congress drew it between the land and the navigable waters of the United States.[4] The legislative his-

[4] Congress did not draw the line as some might argue, as the ludicrous result of using the situs of injury test for coverage, between the thin longshoreman and the fat longshoreman. At the time of the Senate hearings, prior to the enactment of the Longshoremen's Act, an attorney for various interested labor organizations while testifying generally in support of the bill and as to its need noted that if a longshoreman fell while going between the ship and the wharf and hit the wharf, he would be covered under local law, but if he fell between the ship and the wharf he would be denied state compensation and no federal compensation as yet existed. He used as an illustration of the complexities and sometimes the absurdities of jurisdictional problems the case of the fat longshoreman who, in falling, hit both the wharf and the ship (Senate Hearings, pages 29-30). Lines are often difficult to draw but in the enactment of legislation the duty, and indeed the sole authority, to draw the line is that of Congress.

tory of the act clearly shows this to be the case. S. Rep. No. 973, 69th Cong., 1st Sess., at page 16 states:

> "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that *injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship* so as to bring them within the maritime jurisdiction of the United States." (emphasis supplied.)

Coverage of injuries occurring on the wharf was advertently omitted. Thus, there is no question but that at least until the enactment of the Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C.A., section 740, the Longshoremen's Act was "restricted to compensation for injuries occurring on navigable waters", "excludeld] from its own terms * * * any remedies against the employer for injuries inflicted on shore", and left "the injured employees in such cases to pursue the remedies afforded by the local law * * *." (Swanson v. Marra Brothers, Inc., 1946, 328 U.S. 1, 7, 66 S. Ct. 869, 90 L. Ed. 1045.)

The Extension of Admiralty Jurisdiction Act of 1948, enacted two years after the Swanson decision, provides in part:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

Certainly the Extension Act does not strike down the distinction previously made by the courts between land injuries and water injuries. Indeed the act expressly recognizes the existence of land injuries as distinguished from injuries occurring on navigable water. But claimants would have this court equate the jurisdictional requirement of the Longshoremen's Act of the occurrence of the injury "upon

the navigable waters" with occurrence of the injury within the "admiralty jurisdiction" of the United States as that jurisdiction is spelled out in the Extension of Admiralty Jurisdiction Act above and thus extend coverage of the compensation act to certain shoreside injuries not therefore covered.[5] The Extension Act cannot be so construed. First, it is significant that in enacting the Longshoremen's Act Congress specifically chose the phrase "navigable waters" in preference to the phrase "admiralty jurisdiction". As originally introduced, the Longshoremen's Act contained a provision covering "any employment performed on a place *within the admiralty jurisdiction* of the United States, except employment of local concern and of no direct relation to navigation and commerce". (Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., page 2; emphasis supplied.) After much discussion over the advisability of the "local concern" exception, this exception was omitted and the phrase "navigable waters" substituted for the reference to admiralty jurisdiction. Had Congress considered the two phrases identical there would have been no need for the substitution of one for the other. "The exclusion of on-shore injuries to maritime employees otherwise within the Act may have reflected doubts as to Congressional power, in a statute passed under the Constitutional grant of admiralty jurisdiction, to go beyond the highwater mark, or it may have been a policy decision to leave as much as possible to the state compensation com-

[5] Again with reference to the possible inequities arising in the case of the thin longshoreman, possibly covered only by the monetarily less advantageous provisions of a state workmen's compensation act, as distinguished from the fat longshoreman, having recourse to either state or federal coverage, it should be noted that even were the court, in an effort to cure such inequities, seize upon the Extension Act as a means of extending the coverage of the Longshoremen's Act, a longshoreman who while engaged in the loading or unloading of a vessel suffered injuries on a pier would not be entitled to compensation under the Federal Act unless the court could also spell out that his injury was, in some manner, "caused by a vessel on navigable water." The complete coverage urged by those seeking provisions covering "the contract, cover[ing] the job and not simply the man when he is on the ship" would still not be effectuated.

missions." (Gilmore & Black, The Law of Admiralty, page 339, 1957 Edition.)

Secondly, the Extension Act is certainly not an express amendment of the Longshoremen's Act. It is completely silent as to the Longshoremen's Act. Similarly a contemporaneous amendment of the Longshoremen's Act contains no cross reference to the Extension Act. The Extension Act was enacted on June 19, 1948. On June 24, 1948 Congress enacted Public Law No. 757 (62 Stat. 602) — a bill to increase certain benefits payable under the Longshoremen's Act in view of the increase in wages and cost of living since the original passage of the Act in 1927. Nowhere in the legislative history of this amendment is there any reference to any possible extension of coverage under the Longshoremen's Act by the possible passage of the co-pending Extension Act. (1948 U.S. Code, Cong. Serv., Volume 2, pages 1979-1984.)

Thirdly, administrative interpretations of the Longshoremen's Act, while of course not controlling, are not without significance. The Bureau of Employees Compensation of the United States Department of Labor which has been charged with administering the Longshoremen's Act since it was passed, has consistently construed it as not applying to injuries occurring upon a wharf. Opinion No. 16, 1927 A.M.C. 1855. The court is advised that the Bureau still construes the Act as not covering injuries which occur wholly upon a wharf.

Fourthly, the Department of Justice which at one point urged that the Extension Act extended the coverage afforded by the Longshoremen's Act has now retreated from that position. In a recent case, Michigan Mutual Liability Company v. Arrien, D.C. S.D. N.Y. 1964, 233 F. Supp. 496, the brief submitted in the District Court by the Department of Justice on behalf of the Deputy Commissioner raised the issue of the impact of the Extension Act upon the coverage of the Longshoremen's Act. The District Court accepted the approach urged by the government and found an implication in the enactment of the Extension Act that the coverage of the Longshoremen's Act had been

expanded to embrace certain shoreside injuries. The case was appealed. The holding of the United States Court of Appeals for the Second Circuit will be discussed, infra, at page 29, footnote 7. In the appellate brief submitted by the Department of Justice on behalf of the Deputy Commissioner of the Second Compensation District, the government has taken the position that as the accident involved in that case occurred on a "skid", a removable wooden rectangular platform, approximately 6′ by 10′ which was attached to the wharf and extended over the navigable waters to the vessel it was an accident occurring upon the navigable waters of the United States and the Department of Justice has abandoned any reliance upon the argument made in the court below that the enactment of the Extension Act had by implication expanded the coverage of the Longshoremen's Act. In its brief submitted in the instant case, the Department of Justice notes that the Longshoremen's Act is not as far reaching "as the burgeoning maritime tort jurisdiction which has been extended shoreward by such laws as the Jones Act and the Extension Act" and, accordingly concludes that "whatever incursions onto the land may have been permitted by specific legislation or case law, any attempt in the instant case to conform artificially the phrase 'upon the navigable waters of the United States' to fit land injuries such as those with reference to piers, wharves, etc. would be to sanction judicial legislation. A new meaning would have to be given to the quoted phrase." (Memorandum submitted by the Department of Justice on behalf of respondent Deputy Commissioner, page 9.)

Fifthly, in House Report No. 2287, dated July 28, 1958, submitted some ten years after the enactment of the Extension of Admiralty Jurisdiction Act of 1948, the Congressional understanding that injuries upon wharves and other extensions of land are not within the coverage of the Longshoremen's Act was evidenced by the following comment:

> "The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U.S.C. 901 et seq.), provides compensation for injuries suffered by long-

shoremen, ship repairmen, ship servicemen, and workers in related employment when they are working for private employers within the federal maritime jurisdiction *on the navigable waters of the United States,* including drydocks. *These employees are subject to the protection of State safety standards when performing work on docks and in other shore areas.*

* * * * * *

"The Longshoremen's and Harbor Workers' Compensation Act was passed in 1927 as a result of Supreme Court decisions holding that the States could not apply their workmen's compensation laws in an area which was exclusively maritime and that Congress could not lawfully delegate this authority. Amendments to improve the compensation features of the act and bring it up to date have been made in subsequent years. However, the act had never been amended to authorize the establishment of an effective safety program." (1958 U.S. Code, Cong. and Adm. News, Volume 2, pages 3844-3845; emphasis supplied.)

Thus, there is no indication in any of the legislative history pertaining to the Longshoremen's Act either before, at the time of, or after the passage of the Extension Act that the Extension Act was intended in any way to affect the scope of coverage of the Longshoremen's Act. The administrative interpretations by the Department of Labor of the Longshoremen's Act and the construction presently given that act by the Department of Justice do not support a conclusion that the Extension Act was meant to have any, or had any, impact upon the Longshoremen's Act. Even Judge Edmund L. Palmieri in Michigan Mutual Liability Company v. Arrien, D.C. S.D. N.Y. 1964, 233 F. Supp. 496, 501, although finding the Extension Act "illuminating" as to the proper construction to be given to the words "upon the navigable waters" as used in the Longshoremen's Act, noted that the Extension Act "was not an express amendment of the Longshoremen's Act." What claimants then in effect are asking this court to do, advancing arguments almost identical to those urged in 1927

upon Congress (and rejected by it) to the effect that the Longshoremen's Act "should cover the contract, cover the job and not simply the man when he is on the ship", is to hold that the Extension Act sub silentio by implication repealed in 1948 the coverage provisions of the Longshoremen's Act, twenty-one years after its original enactment, and re-enacted the coverage provisions with amendments so as to extend coverage to certain shoreside injuries not previously embraced within the Longshoremen's Act. To so hold would be but the grossest type of judicial legislation, an activity in which this court is not authorized to, and in any event declines to, engage.

The legislative history of the Extension Act itself makes it abundantly clear that Congress in drafting the Extension Act was merely extending the traditional admiralty jurisdiction to include damage occasioned by a vessel situated on navigable waters to person or property situated upon land, such causes of action theretofore having been maintainable only on the common law side. The bill did not attempt to, nor intend to, create new causes of action. House Report No. 1523 describes the effects of the bill as follows:

> "Under existing law, admiralty and maritime jurisdiction in respect of claims arising out of maritime torts is extended by the United States courts to only those cases where injury is done upon navigable waters, and not to those where injury is done to persons or property situated upon land, even though the injury is caused by a vessel situated on navigable waters. For example, if a bridge or pier, or any person or property situated thereon, is injured by a vessel, the admiralty courts of the United States do not entertain the claim for the damages thus caused. Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co. (208 U.S. 316); The Troy (208 U.S. 321); Martin v. West (222 U.S. 191). The bill under consideration would provide for the exercise of admiralty and maritime jurisdiction in all cases of the type above indicated.
>
> "As a result of the denial of admiralty jurisdiction in cases where injury is done on land, when a vessel

collides with a bridge through mutual fault and both are damaged, under existing law the owner of the bridge, being denied a remedy in admiralty, is barred by contributory negligence from any recovery in an action at law. But the owner of the vessel may by a suit in admiralty recover half damages from the bridge, contributory negligence operating merely to reduce the recovery. Further, where a collision between a vessel and a land structure is caused by the fault of a compulsory pilot, the owner of the land structure is without remedy for his injuries since at law a compulsory pilot is not deemed the servant of the vessel's master or owner. Homer Ramsdell Transportation Co. v. Compagnie Generale Transatlantique (182 U.S. 406, 416). But if the vessel sheers off the land structure to collide with another vessel in the vicinity, the owner of the second vessel, by an in rem proceeding in admiralty, may recover full damages, for the wrong is viewed as that of the vessel itself and compulsory pilotage is no defense. The China (74 U.S. 53, 68). The bill under consideration would correct these inequities as a result of providing that the admiralty courts shall take cognizance of all of them.

"The bill will bring United States practice respecting maritime torts into accord with that followed by the British, who by a series of statutes, beginning in 1840, have restored admiralty jurisdiction in situations of this character and brought the British law into harmony with that of most European countries.

* * * * * *

"Adoption of the bill will not create new causes of action." (1948 U.S. Code, Cong. Serv., Volume 2, pages 1899, 1900.)

The legislative history of the Extension Act does not suggest but rather strongly negates any intention on the part of Congress to repeal and then re-enact with amendments the coverage provisions of the Longshoremen's Act. As shown by this history quoted in part above, the Extension Act was passed to cure inequities arising when a vessel

on navigable waters caused damage or injury on land. This statement is made by the court with full awareness that the Supreme Court of the United States has found nothing in the legislative history of the Extension Act to require that the language of the statute itself be given too restrictive an interpretation. (Gutierrez v. Waterman Steamship Corp., 1963, 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297.)

Turning next to the express wording of the Extension Act itself, it can be seen that the wording of that enactment is peculiarly inapplicable to a bill extending coverage under a workmen's compensation act. The Extension Act, Title 46, U.S.C.A., section 740, provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

Most significantly, the statute then continues:

> "In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable waters."

What then has Congress said? To paraphrase the second paragraph of the statute quoted above — in any case where the admiralty jurisdiction of the United States has been extended to a land injury to person or *property*, suit to recover damages may be brought in rem or in personam according to the principles of law and rules of practice applicable if the injury or damage had occurred on navigable waters. Damage to property is never the subject matter of a workmen's compensation act. A proceeding before the Deputy Commission under the Longshoremen's Act is not a suit. A suit is not brought but rather the Act provides for a claim to be filed. The proceeding is not one in rem or in personam. It is an administrative pro-

ceeding commenced with the filing of a claim with an administrative officer, it is conducted in accordance with administrative principles and rules and it terminates not in a judgment enforceable in rem or in personam but terminates with the rendering of an administrative order rejecting the claim or making an award. The Extension Act clearly contemplates the extension of admiralty jurisdiction over a suit based on tort liability to recover damages. The Longshoremen's Act on the contrary sets up an administrative proceeding to obtain compensation without regard to tortious conduct, and with no provision for reduction of "damages" for contributory or comparative negligence. The two statutes do not deal with the same subject matter, are inherently inconsistent with each other, and cannot be read as being in pari materia. The court finds nothing within the four corners of the Extension Act itself to indicate any Congressional intent to amend the jurisdictional test of the occurrence of an injury upon the navigable waters of the United States as that requirement specifically appears within the coverage provisions of the Longshoremen's Act. Indeed the wording of the Extension Act is peculiarly inapplicable to any situation involving an injury to be compensated for by way of a workmen's compensation act.

The decisions rendered since the enactment of the Extension Act merit discussion but lead to no different conclusion. Cases, upon which claimants rely, pertaining to Jones Act (46 U.S.C.A., section 688) liability are not in point for the responsibility of the employer to his seaman-employee thereunder is not circumscribed by any jurisdictional requirement that the situs of the injury be upon the water. The sole jurisdictional requirement is injury in the course of a seaman's employment. Similarly, cases of unseaworthiness liability for land injuries are inapposite for as succinctly pointed out by the Supreme Court of the United States in Gutierrez v. Waterman Steamship Corp., 1963, 373 U.S. 206, 214, 83 S. Ct. 1185, 10 L. Ed. 2d 297, allowing recovery to a longshoreman against a vessel for injuries incurred on land and caused by the ship's unseaworthiness, "the tort of unseaworthiness arises out of a

maritime status or relation and is therefore 'cognizable by the maritime [substantive] law whether it arises on sea or on land' [Strika v. Netherlands Ministry of Traffic, 2 Cir. 1950, 185 F. 2d 555, 558]." Since the cause of action in unseaworthiness arises under the general maritime law and not under a specific enactment such as the Longshoremen's Act, the general admiralty and maritime jurisdictional provisions are controlling and the Extension Act accordingly comes into play. Finally, cases concerned with a seaman's maintenance and cure should be distinguished from cases arising under the Longshoremen's Act, for liability for the care of a seaman is independent of the situs of the injury and is instead a liability depending upon and arising out of the contractual relationship between the parties.

Aside from these totally inapplicable cases, claimants urge upon the court that the following broad and general language appearing in Calbeck v. Travelers Insurance Co., 1962, 370 U.S. 114, 124, 82 S. Ct. 1196, 8 L. Ed. 2d 368, indicates that the coverage of the Longshoremen's Act may, and indeed must, be extended by judicial interpretation to land injuries:

> "In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries *sustained* by employees *on navigable waters*, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3(a) should, then, be construed to achieve these purposes. Plainly, the Court of Appeals' interpretation, fixing the boundaries of federal coverage where the outer limits of state competence had been left by the pre-1927 constitutional decisions, does not achieve them." (Emphasis supplied.)

No support for claimants' position may be found in this excerpt and, indeed, the case as a whole is squarely against claimants. First, the quotation above contains the specific jurisdictional language "on navigable waters". Secondly, the term "on navigable waters" as the sine qua non of

jurisdiction is used in the opinion at least eleven times.[6] Thirdly, it should be noted that under the facts of the Calbeck case the injuries indisputably occurred on navigable waters. The sole issue before the court was whether or not a court-made distinction (having been made prior to the passage of the Longshoremen's Act) that state compensation statutes could constitutionally be applied to employees engaged in the completion of a launched vessel under construction on navigable waters but could not constitutionally be applied to employees engaged in repair work on completed vessels on navigable waters was still valid after passage of the act so as to exempt from federal coverage employees engaged in construction as distinguished from repair work. The Supreme Court held that such judge-made law was not in accord with the intent evidenced by Congress's enactment of the Longshoremen's Act to extend coverage to all injuries sustained on navigable waters. The Supreme Court did not say that by judicial legislation the courts may amend the express jurisdictional requirements of the Longshoremen's Act.

There have been several cases in which the question of the effect of the Extension Act upon the Longshoremen's Act has been raised. In Gladden v. Stockard Steamship Company, 3 Cir. 1950, 184 F. 2d 510, the court took the position that it was not necessary for it to consider and rule upon the issue, stating that the result as far as the plaintiff was concerned would be the same were the tort considered a maritime tort or a terrestrial tort as the plaintiff's action against the decedent's employer would be barred by the "exclusive" remedy provision of the Longshoremen's Act were the tort maritime or by the "exclusive" remedy provision of the state workmen's compensation act were it a terrestrial tort. In Interlake Steamship Company v. Nielsen, 6 Cir. 1964, 338 F. 2d 879, 882, the court, recognizing that the Extension Act "obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act", felt that the Exten-

[6] See pages: 115, 116 (twice), 117, 119, 120, 124, 125, 126, 129 (twice).

sion Act and the trend of case law "all pointed in the direction of expanding the boundaries of admiralty jurisdiction towards land." The court then proceeded specifically to hold that a claimant killed by physically coming into contact with frozen navigable waters by breaking his skull on such waters suffered an injury occurring "on the navigable waters of the United States" and thus his death was compensable under the Longshoremen's Act. This case is certainly not authority for the proposition that a land injury is compensable under the Longshoremen's Act. Judge Harrison L. Winter of this court has likewise recognized the tendency to expand admiralty jurisdiction and in so doing has specifically noted the Calbeck case and the Extension Act. Again his specific holding was that the injury occurred upon navigable waters.

> "I do not have any question in my mind but that this accident did occur upon navigable waters of the United States in the sense that the decedent was on the GUAM, which was, although run aground, in the Patapsco River and the Patapsco River is admittedly navigable." (Boston Metals Company v. O'Hearne, D.C. D. Md. 1963, Admiralty No. 4412 — oral opinion.)

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed stating "since Harris received his injuries on navigable waters, we agree with the District Judge that Calbeck is controlling in this case." (Boston Metals Company v. O'Hearne, 4 Cir. 1964, 329 F. 2d 504, 507.)

The effect, if any, of the Extension Act upon the Longshoremen's Act where the injury occurred upon a dock or pier, as distinguished from an injury occurring upon navigable waters, was raised and was considered in Atlantic Stevedoring Company v. O'Keeffe, D.C. S.D. Ga. 1963, 220 F. Supp. 881, 885, where the court after a careful study of the two acts and their respective legislative histories, stated:

"I find nothing to lead me to the conclusion that Congress intended by the Admiralty Extension Act to broaden and enlarge the jurisdiction of the Longshoremen's and Harbor Workers' Act, and I do not believe such jurisdiction can, or should be, extended by implication."

Judge Walter E. Hoffman in Revel v. American Export Lines, D.C. E.D. Va. 1958, 162 F. Supp. 279, 283-284 (likewise a pier case), after a careful analysis of the issues involved, concluded:

"* * * To oust state compensation acts from an established and important area of coverage by reason of the passage of the Extension in Admiralty Act, which makes no reference to the field of compensation law, would create a situation in which a longshoreman, such as the plaintiff herein, would not be covered by any workmen's compensation act, state or federal, as the federal covers only those injuries occurring 'upon the navigable waters', 33 U.S.C.A. § 903(a), and it is established that injuries suffered on piers or docks (as opposed to drydocks) are not included. It can hardly be said that the Extension in Admiralty Act was also intended to amend the federal compensation act to include injuries occurring on land as well as 'upon the navigable waters', and this is especially true when the Supreme Court has said, 'Congress made clear its purpose to permit state compensation protection wherever possible.' Davis v. Department of Labor and Industries, 317 U.S. 249, 252, 63 S. Ct. 225, 227, 87 L. Ed. 246. See also United States Casualty Co. v. Taylor, 4 Cir., 64 F. 2d 521, 524; Travelers Ins. Co. v. McManigal, 4 Cir., 139 F. 2d 949, 951; both opinions by Judge Soper, cf. Gladden v. Stockard S.S. Co., 3 Cir., 184 F. 2d 510."

On appeal, the United States Court of Appeals for the Fourth Circuit in effect affirmed Judge Hoffman, saying:

"Since Revel was injured while standing on the dock (an extension of the land), his remedies are restricted

to those afforded by the local law. Swanson v. Marra Bros., 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; State Industrial Comm. v. Nordenholt Corp., 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; Cf. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 903 and Kermarec v. Compagnie Generale Transatlantique, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550. *This is true even though the Congress has embraced such cases within the maritime jurisdiction of the United States.* Extension of Admiralty Act, 46 U.S.C.A., § 740." (American Export Lines, Inc. v. Revel, 4 Cir. 1959, 266 F. 2d 82, 84; emphasis supplied.)

This court is in complete accord with the conclusion that, although certain types of land injuries have, by the enactment of the Extension Act, been embraced within the admiralty and maritime jurisdiction of the United States, the specific jurisdictional requirement of the Longshoremen's and Harbor Workers' Compensation Act that to come within the latter act the injury must occur upon the navigable waters of the United States has not been repealed and reenacted with amendments by implication through the passage of the Extension Act. However, even were this court not in agreement[7] with the pronouncement of the United

[7] Although having high regard for its author, the one reported case known to this court, and previously discussed (Michigan Mutual Liability Company v. Arrien, D.C. S.D. N.Y. 1964, 233 F. Supp. 496), equating "upon the navigable waters of the United States" with "admiralty jurisdiction" due to the "illumination" by implication of the Extension Act is completely unpersuasive to this court both in its reasoning and because of its failure to consider and meet the factors relied upon and found controlling in the earlier "pier" cases ruling on this issue, namely, the Atlantic Stevedoring Company case and the Revel case, excerpts of which have been quoted just previously in the text above. In addition it should be noted that the Michigan Mutual case was not a pier case. The injury occurred upon a removable staging or skid, a situation which the deputy commissioner in effect found to be, and which the Department of Justice now urges is, comparable to a gangplank or ladder situation. An injury upon a gangplank or ladder has long been

States Court of Appeals for the Fourth Circuit, it would consider itself bound by the excerpt quoted above.

Accordingly, this court holds that the compensation order denying compensation benefits and complained of in Admiralty No. 4704, and the compensation order denying compensation benefits and complained of in Admiralty No. 4705, are in accordance with the law. Judgment is hereby entered in favor of the respondent Deputy Commissioner in both of the aforesaid cases and the complaints in both cases are hereby dismissed without costs.

R. DORSEY WATKINS,

United States District Judge.

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held to be within the coverage of the Longshoremen's Act. (Ford v. Parker, D.C. D.Md. 1943, 52 F. Supp. 98, an opinion by the late Judge W. Calvin Chesnut).

Since this opinion was drafted the United States Court of Appeals for the Second Circuit has held the injury in the Michigan Mutual case compensable under the Longshoremen's Act on the ground that the skid more closely resembled a gangway than a pier, thus retaining and applying the established distinction between injuries occurring upon navigable waters and injuries occurring upon extensions of land such as piers or wharves. The Second Circuit rejected rather than adopted the lower court's equation of "upon navigable waters" with "admiralty jurisdiction". (Michigan Mutual Liability Co. v. Arrien, 2 Cir. 1965, 344 F. 2d 640, 645 — footnote 3). Circuit Judge Paul R. Hays, dissenting on another ground, specifically noted that "[w]hen Congress adopted the Admiralty Extension Act it had an opportunity to expand federal compensation to cover all longshoremen's injuries caused in loading and unloading vessels. Congress did not take advantage of that opportunity." (344 F. 2d 640, 648-649).

OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED AND ENTERED SEPTEMBER 10, 1965, REPORTED AT 245 F. SUPP. 51.

[R. Vol. II, pp. 34-42]

In the United States District Court for the Eastern District of Virginia, Norfolk Division

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Civil Action No. 4798

John W. East,

Petitioner,

v.

Jerry C. Oosting, Deputy Commissioner, United States Employees' Compensation Commission, Fifth Compensation District,

Respondent,

United States Lines Company and The Travelers Insurance Company,

Intervenors.

Civil Action No. 4976

Albert Avery,

Petitioner,

v.

Jerry C. Oosting, Deputy Commissioner, United States Employees' Compensation Commission, Fifth Compensation District,

Respondent,

Liberty Mutual Insurance Company,

Intervenor.

MEMORANDUM

In substantially identical actions each of petitioners seeks a trial *de novo* on the jurisdictional issue, and further

requests the entry of an order setting aside the findings of the Respondent Deputy Commissioner, which were to the effect that the injury in each case did not occur upon the navigable waters of the United States within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

The two cases have not been consolidated for trial or hearing, but the governing principles in each case are essentially the same and are the subject of this joint memorandum for the convenience of the Court. However, separate orders should be entered and, if appeals are noted, separate notices of appeal should be filed.

In *East*, the petitioner was an employee of the United States Lines Company on June 17, 1963. The employer was engaged in maritime employment on the navigable waters of the United States and, at the time in question, had a verbal agreement with Whitehall Terminal Corporation, a stevedoring concern, to discharge cargo from the S.S. AMERICAN PRESS which was moored on the north side of pier No. 2, Army Base; the pier being owned by the Department of Commerce, Maritime Commission, but the north side being leased to Whitehall Terminal Corporation. The pier is 334 feet wide and projects out over the Elizabeth River at an approximate right angle from the land a distance of 1328 feet. The pier is supported by piles sunk into the river bed. There is a shed on the pier covering a distance of 1280 feet, the first 500 feet being two stories high. The width of the apron of the pier at the extreme offshore end is 40 feet, and on the north side is 36 feet. The depth of the water at mean low water off the end of the pier is from 30 to 35 feet and along the north side of the pier's apron is 30 feet. While not in the finding of the Deputy Commissioner, the parties have stipulated that there was water under the pier of sufficient depth to permit a small barge or a small launch or rowboat to go between the pilings. It is further agreed that no cargo boat could go under the pier. The pier is attached and connected to the land and, as such, is an extension of land. East was employed as a cargo checker and, at times, it became necessary for him

to board vessels. On the day in question East was assigned to check cargo on the north side of Pier No. 2, adjacent to the No. 5 hatch of the AMERICAN PRESS, as the cargo was discharged from the hatch. While checking cargo *under the shed,* he was struck on the leg by a bale of wool which had fallen off a fork lift being operated by an employee of Whitehall. Thus he was on the surface of the pier when he sustained his injury. He was awarded compensation benefits under the Workmen's Compensation Act of Virginia, but the Deputy Commissioner rejected East's claim for benefits under the Longshoremen's and Harbor Workers' Act as the injury sustained did not occur upon the navigable waters of the United States (including any dry dock).

In *Avery,* the petitioner was an employee of Old Dominion Stevedoring Corporation in the capacity of longshoreman at the time of his injury on December 28, 1961. He was assigned, together with other members of the work gang, to an open type railroad car and was engaged in hooking up logs which, in turn, were being hoisted from the railroad car by means of the ship's gear and loaded onto the vessel which was afloat in the Elizabeth River. While a log was being lifted from the railroad car by the ship's gear, petitioner was struck by one or more logs so attached to the vessel's gear, thereby crushing him against the side of the railroad car. The railroad car in question was on the surface of Pier B, City Piers, which is a usual type structure existing in the Norfolk area. The pier is attached to land at one end and extends outward and over the waters of the Elizabeth River, thereby becoming an extension of land. Avery was awarded compensation benefits under Workmen's Compensation Act of Virginia, but the Deputy Commissioner rejected his claim for benefits under the Longshoremen's and Harbor Workers' Act as the injury sustained did not occur upon the navigable waters of the United States (including any dry dock).

In both cases the injury occurred on a pier. In *East,* it took place under a shed on a pier. In *Avery,* the injury

was apparently on the apron area as there is no suggestion of any shed on the pier in question. Moreover, in *Avery*, the injury occurred as a result of an actual loading operation while the ship's gear was attached to logs being hoisted from a railroad car. We do not believe that these minor differences create any contrary rule to the well-established principle of law and the actions of the Deputy Commissioner are approved and affirmed, thus calling for a denial of each petition and a judgment for the respondent in each case.

Initially we may dispose of petitioners' contentions that they are entitled to a trial *de novo* on the jurisdictional issue. Our views on this subject have been previously discussed in *Dixon v. Oosting*, E.D. Va., 238 F. Supp. 25, and we adhere to this ruling. In short, a trial *de novo* on the issue of jurisdictional facts is not mandatory but is a matter of discretion.

We will not repeat the familiar rule that findings of the Commissioner are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole, *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, or "unless they are irrational," *O'Keeffe v. Smith Associates*, 380 U.S. 359. We recognize these principles as the scope of judicial review.

The main thrust of petitioners' argument is that the water under the pier is sufficient to constitute navigable waters of the United States and, therefore, the injury is compensable under the federal act. From time immemorial piers, docks, wharves and other like structures, which are firmly attached to the land and extend over navigable waters, have been deemed to be extensions of the land, and injuries suffered thereon are compensable only under state compensation laws. *Swanson v. Marra Bros.*, 328 U.S. 1; *American Export Lines, Inc. v. Revel*, 4 Cir., 256 F. 2d 82; *Hastings v. Mann*, 4 Cir., 340 F. 2d 910, cert. den. 380 U.S. 963. If, of course, the damage is caused by a vessel, the Extension of Admiralty Act, 46 U.S.C., § 740, becomes effective but this is clearly not the situation in *East*. As to

Avery, it is argued that, while the injury was sustained on the pier, the log or logs were attached to the ship's gear and, therefore, the Admiralty Extension Act of 1948 is applicable. However, the legislative history does not suggest that Congress intended to broaden the coverage afforded by the Longshoremen's and Harbor Workers' Act. Sen. Rep. No. 1593, H.R. No. 1523, 80th Cong., 2nd Sess., 1948, 2 *U. S. Code, Cong. & Adm. News* 1898. Judicial decisions, even since the landmark case of *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, similarly hold that the coverage is not extended by the Admiralty Extension Act. *Interlake Steamship Company v. Nielsen*, 6 Cir., 338 F. 2d 879, 882; *Hastings v. Mann*, supra.

The recent case of *Michigan Mutual Liability Co. v. Arrien*, 2 Cir., 344 F. 2d 640, is especially pertinent in holding that the point of injury is essentially decisive. While the ruling in *Arrien* upheld an award under the Longshoremen's and Harbor Workers' Act, the injured longshoreman was knocked off a temporary "skid" which extended from the pier to the vessel. In declining to analogize a temporary skid to a wharf, Circuit Judge Kaufman said:

> "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land."

We are unable to predict what may be forthcoming in considering the extension of coverage under the Longshoremen's and Harbor Workers' Act. However, it is abundantly clear that the Senate Judiciary Committee, in considering the matter in 1927, definitely noted that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship. Sen. Rep. 973, 69th Cong., 1st Sess., p. 16.

The fact that, in *East*, the cargo checker occasionally boarded the vessel in the performance of his duties fails to impress us. While it may appear inconsistent to com-

pensate a cargo checker injured aboard a vessel under the federal act and, at the same time, deny him such benefits if injured while on the pier, any recourse is through legislative action by way of amendment to the act.

We do not believe that the *Calbeck* case has materially altered prior rulings as applied to the facts of the two cases now before the Court. *Calbeck* did not involve an injury on a pier; it was concerned with coverage for injuries on a new vessel under construction and afloat upon navigable waters. Moreover, in footnote 10 (370 U.S. 121) Mr. Justice Brennan quotes the language set forth above in the Senate Report which expressly excluded coverage for injuries occurring in loading or unloading "unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

The question presented is not new in the Fourth Circuit. Prior to *Calbeck*, Judge Sobeloff had occasion to comment upon the status of a longshoreman injured on a dock when a drum fell from the ship and rolled along the pier striking him. While the Fourth Circuit held that the longshoreman was not precluded from recovery against the shipowner by reason of the acceptance of state compensation benefits, it also pointed out in *American Export Lines, Inc. v. Revel*, supra, at p. 84, that:

> "Since Revel was injured while standing on the dock (an extension of the land) his remedies are restricted to those afforded by local law. . . . This is true even though the Congress has embraced such cases within the martime jurisdiction of the United States. Extension of Admiralty Act, 46 U.S.C.A. § 740."

And in *Hastings v. Mann, supra*, a decision subsequent to *Calbeck*, the Fourth Circuit again said:

> ". . . [I]t has been uniformly held that piers, docks, wharfs and similar structures extending over navigable waters are extensions of land, though their use and purpose be maritime. Damage to such structures

and personal injuries suffered by persons while upon such structures are not compensable in Admiralty, unless, under the 1948 Act, caused by a vessel on navigable waters."

Other circuits have consistently held that persons injured upon a pier are restricted to compensation benefits under state law. *Hagans v. Ellerman & Bucknall S.S. Co.*, 3 Cir., 318 F. 2d 563; *Delaney v. Towmotor Corp.*, 2 Cir., 339 F. 2d 4; *Kent v. Shell Oil Co.*, 5 Cir., 286 F. 2d 746.

The *Avery* case concededly is stronger than *East* as it is at least arguable that Avery's injury was caused by a vessel on navigable water, notwithstanding that such injury was consummated on land, and hence is covered by the Extension of Admiralty Jurisdiction Act of 1948. The difficulty with Avery's contention is that he seeks to equate the terms "admiralty and maritime jurisdiction," as stated in the Act of 1948, with the jurisdictional requirement of the occurrence of the injury "upon the navigable waters" as provided in the Longshoremen's and Harbor Workers' Act. The question was answered by this Court in *Revel v. American Export Lines*, E.D. Va., 162 F. Supp. 279, 283-284, aff'd 4 Cir., sub. nom. *American Export Lines v. Revel*, 266 F. 2d 62, 84. But the *Avery* case is identical with *Johnson v. Traynor, Deputy Commission*, 243 F. Supp. 184, 34 L.W. 2001, decided by Judge R. Dorsey Watkins for the District of Maryland on June 22, 1965. The exhaustive opinion of Judge Watkins cogently points to the reasons why the Admiralty Extension Act of 1948 did not amend the Longshoremen's and Harbor Workers' Act. We adopt the reasoning of the *Johnson* case and concur in this finding, thus disposing of the *Avery* case on the same basis as *East*.

Present orders in accordance with this memorandum.

/s/ WALTER E. HOFFMAN,

United States District Judge.

Norfolk, Virginia

September 10, 1965

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED AND ENTERED JUNE 20, 1968, REPORTED AT 398 F. 2d 900.

[R. Vol. III, pp. 85-111]

United States Court of Appeals
for the Fourth Circuit

No. 10,060

Marine Stevedoring Corporation, and Liberty Mutual Insurance Company,

Appellants,

v.

Jerry C. Oosting, Deputy Commissioner, United States Employees' Compensation Commission, Fifth Compensation District,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, District Judge.

No. 10,298

William H. Johnson,

Appellant,

v.

John P. Traynor, Deputy Commissioner, U. S. Department of Labor, and Nacirema Operating Co., Inc., a body corporate,

Appellees.

No. 10,299

Julia T. Klosek, widow of Joseph T. Klosek, deceased employee,

Appellant,

v.

John P. Traynor, Deputy Commissioner, U. S. Department of Labor, and Nacirema Operating Co., Inc., a body corporate,

Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. R. Dorsey Watkins, District Judge.

No. 10,323

Albert Avery,

Appellant,

v.

Jerry C. Oosting, Deputy Commissioner, United States Employees' Compensation Commission, Fifth Compensation District, and Liberty Mutual Insurance Company,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, District Judge.

(Reargued February 5, 1968 Decided June 20, 1968.)

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges, sitting en banc.

[Appearance omitted in printing.]

SOBELOFF, Circuit Judge:

The common question presented by these cases consolidated for appeal[1] is whether injuries sustained by four longshoremen while working on the docks and engaged in three separate loading operations are compensable under the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C.A. § 901 et seq. In none of the cases are the facts in dispute; only the intended scope of the Act is contested.

In *Marine Stevedoring v. Oosting*, No. 10,060, a stevedoring company was under contract to handle the lines and cables in moving and mooring the S.S. JAMES E. HAVILAND. Vann, one of its employees, was lifting a cable off the stern bollard when it suddenly straightened, catapulting him off the pier and into the river where he drowned. Death benefits awarded by the deputy commissioner were affirmed by the District Court. 238 F. Supp. 78 (E.D. Va. 1965).

In Nos. 10,298 and 10,299, Johnson and Klosek were members of a longshoremen's "gang" engaged in loading a cargo of steel beams aboard the S.S. BETHTEX, moored to the Bethlehem Steel High Pier, Sparrows Point, Maryland. They had been assigned to the pier to work as "slingers or hook-on men," and it was their job to board the railroad gondola cars used to carry the beams onto the pier and to fasten drafts to the ship's crane in preparation for loading. At the time of the accident, as the crane raised a draft out of the car, it began to rotate. One end of the draft caught Klosek, lifted him from the car and dropped him head first onto the pier, killing him, while the other end struck Johnson and crushed him against the side of the car. The deputy commissioner denied the claim brought by Klosek's widow and also the claim submitted by Johnson, who had sustained disabling injuries. The

[1] After being heard below as three separate cases, they were consolidated on appeal and were initially argued on February 9, 1966 before a panel of the court consisting of Haynsworth, Chief Judge, and Sobeloff, Circuit Judge, and Hutcheson, District Judge. At the request of the court, the cases were reargued en banc.

District Court affirmed, holding that the injuries had not occurred within the jurisdictional scope of the statute. 243 F. Supp. 184 (D. Md. 1965).

Like Klosek and Johnson, Avery, in No. 10,323, was working as a slinger in a gondola car attaching drafts of logs to a ship's crane for loading. He too was severely injured when a swinging draft pinned him against the side of the car. For the same reasons as in Klosek and Johnson, he was denied relief under the Longshoremen's Compensation Act. The District Court affirmed.

Each of the injured men was a member of a "gang" of approximately twenty assigned by his employer to work on a particular vessel. As was the practice at the ports where these injuries occurred, the entire gang reported to the vessel and two to four of the men were then ordered back onto the pier to work as "slingers or hook-on men" during the loading operation.[2] The job performed by the men on the pier is basically the same as the work done by their fellow longshoremen on board. Indeed, it is not uncommon for the men to rotate positions and continually pass back and forth between ship and wharf during a given operation. Indisputably, at the time of each accident the injured longshoremen were engaged in maritime employment on a high pier at a point several hundred feet from shore. Further, it has been stipulated that the piers in question extended into navigable waters and were sufficiently high to permit the passage of small boats and barges under them.

The Longshoremen's and Harbor Workers' Compensation Act provides in relevant part that:

"Section 3

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee,

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[2] At the time of their injuries, both Vann and Avery were employed at the port in Norfolk, Virginia. While the same practice is followed at the Maryland and Virginia ports, it often varies in other sections of the country. At some ports the assignment of men to particular positions is made on the basis of seniority, the most senior workers being assigned to the hold when the weather is bad and to the pier in good weather. At other ports, the men rotate throughout the day.

but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

The issue before us is whether an injury on a pier falls within the jurisdictional provision "upon the navigable waters," and thus within the coverage of the Act.

The answer is found in part in the history of this legislation. Ten years before the passage of the Act, the Supreme Court held that longshoremen injured on vessels or on gangplanks between vessels and piers were exclusively within federal maritime jurisdiction and thus barred from recovery under state compensation acts. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Clyde S.S. Co. v. Walker*, 244 U.S. 255 (1917). Subsequent efforts by Congress to extend the benefits of existing state acts to maritime injuries were struck down as unconstitutional delegations of the legislative powers of Congress.[3] *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. Dawson & Co.*, 264 U.S. 219 (1924). In its third attempt to provide compensation for the yet uncovered longshoremen, Congress in 1927 enacted the Longshoremen's Compensation Act.[4]

Denominated "An Act to provide compensation for disability or death resulting from injuries to employees in certain maritime employment," 44 Stat. 1424, the Act em-

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[3] Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

[4] Congress acted partly in response to the Supreme Court's invitation in Washington v. Dawson Co., *supra* at 227, to exercise its maritime powers in order to provide federal coverage for longshoremen: "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several states."

bodies a comprehensive compensation plan for all longshoremen engaged in "loading, unloading, refitting, and repairing ships," on navigable waters. S. Rep. No. 973, 69th Cong., 1st Sess., p. 16. As originally drafted, the bill provided coverage for injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce." S. 3170 & H.R. 9498. Although enthusiastic about its general objectives, representatives of both the unions and the shipping industry uniformly voiced dissatisfaction with the bill's jurisdictional provision. At the Committee hearings, a union spokesman pointed out that as originally drawn, the effect of the bill would necessarily be harmful to repairmen and longshoremen who continually pass back and forth between state and federal jurisdiction, each exclusive of the other. Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., March 16 and April 2, 1926, pp. 29-31. In the same vein, spokesmen for the shipping industry complained that the bill was not sufficiently inclusive and urged that the final bill "include all maritime employment under the admiralty jurisdiction." Senate Hearings, pp. 95-101. A representative of the Labor Department also appeared and testified that Congress had sufficient power to enact a compensation statute that would extend to all injuries to maritime workers occurring "on the dock, on the bridge and in the ship," and on behalf of the department argued for an amendment to the bill that would provide "coverage of the contract and not coverage of the men in one spot performing one part of the contract." Senate Hearings pp. 40-41.

The lone dissident voice was that of the International Association of Industrial Accident Boards and Commissions, author of the pending bill and the Acts previously declared unconstitutional. It sought to maintain the limited scope of the bill, leaving as much as was constitutionally permissible to the states.

At the conclusion of the hearings, the bill was revised and submitted to Congress in its present form. While no further explanation of the various revisions is to be found in either the committee reports or congressional debates, it

is certainly reasonable to infer that the modifications represent an acquiescence in the broader coverage sought by almost all witnesses and, consequently, a rejection of the narrow jurisdictional position espoused by the IAIABC.

Beyond question, Congress could constitutionally ground jurisdiction on the function or status of the employees, as the Labor Department urged, and thus extend coverage to all longshoremen injured during the loading, unloading, repairing or refitting of vessels regardless of the situs of the injury. See The Admiralty Extension Act, 46 U.S.C.A. § 740 (1948);[5] *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963); *American Stevedoring v. Porello*, 330 U.S. 446 (1947); *Sanderlin v. Old Dominion Stevedoring Corp.*, F. 2d (4 Cir. 1967); *Spann v. Lauritzen*, 344 F. 2d 204 (3 Cir. 1965); *United States v. Matson Nav. Co.*, 201 F. 2d 610 (9 Cir. 1953).[6] The question, therefore, is whether Congress fully exercised this power, as the injured longshoremen contend, or whether it incorporated in the revised bill the phrase "upon the navigable waters" specifically to freeze coverage to injuries occurring within the admiralty tort jurisdiction as it was thought to exist in 1927, as the stevedoring and insurance companies insist. While the definitive answer is not forthcoming from either the Act itself or its history, we find substantial support for the conclusion that Congress designed the Act to be status oriented, reaching all injuries sustained by longshoremen in the course of their employment.[7]

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[5] The act provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

[6] *See also*, Thompson v. Calmar Steamship Corp., 331 F. 2d 657 (3 Cir. 1964); Hagans v. Ellerman and Bucknall Steamship Co., 318 F. 2d 563 (3 Cir. 1963); Puget Sound Bridge & Dry Dock Co. v. O'Leary, 260 F. Supp. 260, 264 (W.D. Wash. 1966).

[7] The Senate revisions, concurred in by the House, certainly met many of the objections raised by the witnesses; how far they went toward meeting the Labor Department's suggestion that the bill be status oriented is admittedly less clear.

The passage from the Senate Report, No. 973, 69th Cong., 1st Sess. 16, most often relied upon to support the narrow jurisdictional

Prolonged discussion of this issue is now unnecessary, however, since it has been authoritatively resolved by the Supreme Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). Quoting with approval the Fifth Circuit in *Debardelen Coal Corp. v. Henderson*, 142 F. 2d 481 (1944), the Court stated:

> "The elaborate provisions of the Act, viewed in light of prior Congressional legislation as interpreted

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view that Congress intended to limit coverage to injuries occurring within the maritime tort jurisdiction as it was then thought to exist, excluding pier-side injuries, reads as follows:

> "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

While it has been said that this passage suggests that the Senate Committee intended the Act to be situs oriented, it is no less reasonable to read the passage as extending the benefits of the Act to all who may be brought within the maritime jurisdiction. Moreover, other passages from the Reports of both Houses indicate that Congress was primarily concerned with the status of the potential claimants. For example in the Senate Report, in the paragraph immediately following the oft-cited passage quoted above, it is stated:

> "If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, *they are excluded from these laws by reason of the character of their employment;* and they are not only excluded but the Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this *occupation*. (Emphasis added.) S. Rep. No. 973, 69th Cong., 1st Sess. 16"

To like effect is H.R. Rep. No. 1767, 69th Cong., 2d Sess. 20:

> "The principle of workmen's compensation has become so firmly established that simple justice would seem to require that this class of maritime workers should be included in this legislation * * *.
>
> The bill as amended, therefore, will enable Congress to discharge its obligation to the *maritime workers placed under their jurisdiction by the Constitution of the United States* by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same

> by the Supreme Court, leaves no room for doubt, as it appears to us, *that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter.* * * * It is sufficient to say that *Congress intended the compensation act to have a coverage co-extensive with the limits of its authority.*" 370 U.S. at 130. (Emphasis added.)

Those opposed to extending coverage in the instant case argue that *Calbeck* has no bearing since the Supreme Court was not concerned with the meaning of "upon the navigable waters," but was merely interpreting the phrase "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." In answer, we need only repeat Judge Palmieri's observation in *Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496, 501 (S.D. N.Y. 1965), *aff'd*, 344 F. 2d 640 (2 Cir. 1965), that "[w]hat is just as important as the actual holding in *Calbeck* is the general approach to the [Longshoremen's Compensation] Act taken by the Court. No longer is the Act viewed as merely filling in the interstices around the shore line of the state act, but rather as an affirmative exercise of admiralty jurisdiction."

> remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the union." (Emphasis added.)

Or, as Congressman LaGuardia summed up:

> "This law simply gives the longshoreman the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it." 68th Cong. Rec. 5414.

We are aware that the Fifth Circuit recently reached the opposite conclusion in Travelers Insurance Company v. Shea, 382 F. 2d 344, 346 (1967), stating, "[t]he coverage of the Act is not keyed to function but has uniformly been situs-oriented," relying on its own opinion in O'Keeffe v. Atlantic Stevedoring Co., 354 F. 2d 48, 50 (1965). A refutation of the asserted uniformity appears in the same circuit's decision in Holland v. Harrison Bros., 306 F. 2d 369, 373 n.4 (1962), that while "[t]he literal language of the Longshoremen's Act seems to concern only the locality of the accident, * * * the history of the Act indicates that its underlying purpose was to embrace the admiralty jurisdiction whatever that might be." We think that in the latter decision the Fifth Circuit expressed the correct view.

This affirmative exercise of the admiralty power of Congress "to the fullest extent" of its jurisdiction, creating "a coverage co-extensive with the limits of its authority," can only mean that Congress effectively enacted a law to protect all who could constitutionally be brought within the ambit of its maritime authority. Again, in the words of Judge Palmieri, "it thus appears that 'upon navigable waters' is to be equated with 'admiralty jurisdiction'."

This interpretation of the Act, giving the injured longshoreman the broadest protection, not only fully complies with the mandate of the Supreme Court in *Voris v. Eikel*, 346 U.S. 328, 333 (1953) that the Act be liberally construed, but also comports with the Court's observation in *Calbeck, supra* at 123, that the Act should be read to avoid the "uncertainty, expense, and delay of fighting out in litigation" the proper source of compensation, state or federal. As early as 1942, the Court sought to attain this objective by recognizing that the "undefined and undefinable" boundaries between state and maritime jurisdiction created a "twilight zone" of overlapping jurisdictions. *Davis v. Department of Labor and Industries*, 317 U.S. 249. Aptly described by Judge Qua as "designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to land and the sea where a reasonable argument can be made either way," *Moores' Cases*, 323 Mass. 162, 167, 80 N.E. 2d 478, 481, *aff'd sub. nom., Bethlehem Steel Co. v. Moores*, 335 U.S. 874 (1948), this "twilight zone" merely represented a judicial articulation of the presumption of coverage incorporated in the Act.[8]

An alternative route, advocated by some courts, would also extend coverage under the Act. Concluding that Congress had exercised the more limited tort jurisdiction, Judge Palmieri in *Michigan Mutual, supra*, and Judge Winter in *Boston Metals v. O'Hearne*, 1946 A.M.C. 2351 (D. Md.

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[8] Section 920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

1963), *aff'd*, 329 F. 2d 504 (4 Cir. 1964), *cert. denied*, 379 U.S. 824 (1964), nevertheless found that accidents that might previously have fallen outside the scope of the Act are covered by virtue of the expansion of the admiralty tort jurisdiction. They reasoned, in light of *Calbeck* that the phrase "upon navigable waters" in this remedial legislation was not limited to the tort jurisdiction as it was thought to have existed in 1927, but must be construed to include the full range of the legislatively and judicially expanded concept of maritime jurisdiction.[9] Thus, with the passage of the Admiralty Extension Act, the protection afforded by the Compensation Act was given an expanded construction covering pier-side injuries. Other cases that have read *Calbeck* to enlarge coverage under the Act include *Interlake S.S. Co. v. Nielsen*, 338 F. 2d 879, 882-883 (6 Cir. 1965); *Spann v. Lauritzen*, *supra*;[10] *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, *supra*.[11]

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[9] While both judgments were affirmed, by the Second and Fourth Circuits, respectively, in neither case did the Court of Appeals find it necessary to reach this precise issue. There is dictum in the Second Circuit's opinion that an injury on the wharf might not qualify under the Compensation Act. Judge Kaufman, however, specifically reserved the question, stating: "In view of the reasons we have articulated for our holding we find it is unnecessary to decide whether the award may also be sustained on the ground that the Admiralty Extension Act * * * enlarged the coverage of the Longshoremen's Act." 344 F. 2d at 646 n.4. Indeed, the opinion went on to observe that *Calbeck* "has been interpreted, in every appellate decision where the question has arisen, as mandating that a federal compensation award must be upheld if there is a reasonable argument for coverage under the Longshoremen's Act." 344 F. 2d at 646.

[10] Although the issue was not before the court, we read the inclusion of a passage from Reed v. Yaka, 373 U.S. 410 (1963) to the effect that "the Longshoremen's and Harbor Workers' Act was not intended to take away from longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation," as an indication that the Third Circuit would have upheld an award the longshoreman, who, in that case was injured on a pier by the handle of a hopper also located on the pier during the unloading of a vessel.

[11] To the extent that the present opinion deviates from this court's earlier pronouncement in American Export Lines, Inc. v. Revel,

Moreover, *Calbeck* is not the only Supreme Court decision pointing inescapably to this conclusion. In *Reed v. Yaka*, 373 U.S. 410, 415 (1963), the Court reiterated its earlier mandate that "the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' "[12] This direction was then amplified by the explanation that "[i]t would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances * * *. [Those] subject to the same danger * * * [are] entitled to like treatment under law."[13] It is precisely such a harsh and incongruous result that the stevedores and their insurers now urge upon us.

We examine a number of these incongruities. First, as noted above, the injured longshoremen were members of a gang all of whom did basically the same work for the same pay and were subjected to the same risks, passing freely from ship to pier in the course of their work. All would concede that a longshoreman crushed by a rotating draft while working in a ship's hold would be entitled to recover under the Act. It would be intolerably harsh and incongruous to deny the same benefits to a longshoreman injured while performing the same task on an adjoining pier.

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266 F. 2d 82 (1959), we are of the view that *Revel* has been overruled by *Calbeck*.

[12] Voris v. Eikel, 346 U.S. 328, 333 (1958).

[13] We are of the opinion that the passage quoted above from Reed v. Yaka clearly proscribes the conclusion reached by the Fifth Circuit in Travelers Insurance Company v. Shea, 382 F. 2d 344, 346 (1967) that "[s]ince there exists hybrid employment with labors terrestial and maritime and since state coverage does not preclude federal coverage, [Calbeck], we do have the paradox of two workers doing the same type of work a few feet apart receiving injuries in the same way, yet treated as legal strangers. The paradox is not judicially soluable unless we extirpate the words 'upon * * * navigable waters * * * (including any dry dock)' from the statutory commandment * * *."

It is noteworthy that the court in Travelers v. Shea, *supra*, fails to analyze or consider the impact of *Calbeck* or *Yaka* on the Longshoremen's Compensation Act.

Secondly, courts have held that "upon navigable waters" covers injuries sustained by persons flying over the water, *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (2 Cir. 1956); working under the water, *Smith v. Brown & Root Marine Operators, Inc.*, 243 F. Supp. 130 (W.D. La. 1965); repairing ships on dry docks or the land around dry docks, *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953); *Holland v. Harrison Bros. Drydock & Ship Repair Yard, Inc.*, 306 F. 2d 269 (5 Cir. 1962); and constructing dry docks, *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (4 Cir. 1951). The phrase "upon navigable waters" has also been held to cover injuries to longshoremen caught by the ship's gear, lifted momentarily from the pier, and dropped either into the slip or onto the pier itself, *O'Keeffe v. Atlantic Stevedoring Company*, 354 F. 2d 48 (5 Cir. 1965); *L'Hote v. Crowell*, 54 F. 2d 212 (5 Cir. 1931); *Richards v. Monahon*, 17 F. Supp. 252 (D. Mass. 1936). In *Interlake v. Nielsen*, *supra*, the Sixth Circuit upheld a judgment obtained on behalf of a maritime employee who drowned when he drove his car off the end of a pier. And presumably, the Act would further extend to a longshoreman injured in the waters immediately beneath the pier regardless of how he got there; but not, the stevedores here contend, to injuries sustained by maritime workers performing traditional maritime tasks, injured on a pier above the water.

The harshness and incongruity that would necessarily result in light of precedents above cited if we were to deny coverage to pier-side injuries like those with which we are here concerned is readily apparent from the disparate treatment of the four longshoremen in the instant case. Although all, at the time of their injuries, were performing similar jobs exposing them to similar risks, only Vann, who happened to fall into the water, and Klosek, who was momentarily lifted from the pier, would qualify under the Act. Such fine-spun distinctions are clearly condemned by *Yaka*, *supra*.

A third incongruity, that would be frozen into law if the contentions of the stevedores were to prevail, is appar-

ent from broad liberal construction that has been applied to the term "dry dock," *Holland v. Harrison Bros., supra,*[14] compared with the very narrow interpretation they would attach to the phrase "upon navigable waters." We perceive no rational justification for this diverse treatment.

Finally, the parties have stipulated that small vessels are able to navigate beneath the piers on which the accidents in the instant cases took place. These waters are therefore navigable in fact.[15] Since the jurisdictional scope of the

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[14] Dry docks were held to include the land surrounding them. *See* Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, *supra.*

[15] We recognize that this conclusion appears to be in conflict with that recently reached by the Second Circuit in Michigan Mutual Liability Co. v. Arrien, 344 F. 2d 640, 644 (1965). Speaking for that court, Judge Kaufman stated: "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land." With all deference, we find no support for this conclusion. It conflicts with the Supreme Court's holding that "when once found to be navigable, a waterway remains so." United States v. Appalachian Power Co., 311 U.S. 377, 408 (1940); Economy Light Co. v. United States, 256 U.S. 113 (1921).

The generally accepted test of navigibility was laid down by the Court in Daniel Ball, 77 U.S. 557, 563 (1870) as follows: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And *they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce,* over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (Emphasis added.) More recently, the Supreme Court declared that "[t]he fact * * * that artificial obstructions exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state." Economy Light and Power Co. v. United States, *supra* at 118. *See* Montello, 87 U.S. 430, 431 (1874) ("If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact * * *.");
Ingram v. Associated Pipeline Contractors, Inc., 241 F. Supp. 4 (E.D. La. 1965); Madole v. Johnson, 1965 A.M.C. 2610.

In light of these cases, Judge Waterman, also of the Second Circuit, concluded that a body of water is "navigable water" if "(1)

phrase "upon navigable waters" extends to injuries occurring "above" such waters, see *D'Aleman v. Pan American Airways, supra*, we are compelled to conclude that the injuries suffered by Vann, Johnson, Klosek and Avery were all sustained upon the navigable waters of the United States.

Regardless of the route traveled, we arrive at the conclusion that the injuries of all four longshoremen are embraced by the Act. In rejecting the arguments advanced by the stevedoring companies, we are mindful of the pertinent observations of Judge Soper, presaging the recent Supreme Court decisions, that "[t]he reference to 'maritime employment' and injury 'upon the navigable waters of the United States (including any dry dock),' should be broadly construed," and that the coverage of the Act "should not be frustrated by needless refinements." *Newport News Shipbuilding and Dry Dock Co. v. O'Hearne*, 192 F. 2d 968, 971 (4 Cir. 1951).

We are well aware that the conclusions reached in this opinion have not been uniformly adopted in other circuits. See *Houser v. O'Leary*, 383 F. 2d 730 (9 Cir. 1967); *Travelers Insurance Company v. Shea*, 382 F. 2d 344 (5 Cir. 1967); *Nicholson v. Calbeck*, 385 F. 2d 221 (5 Cir. 1967); but see, also in the Fifth Circuit, *Holland v. Harrison Bros. Dry Dock and Repair Yard, Inc., supra*. However, for the reasons fully developed herein, we decline to follow them.

We therefore affirm the judgment of the District Court upholding the deputy commissioner's award in Marine Stevedoring v. Oosting, No. 10,060, and reverse the judgments in Johnson, Klosek and Avery, Nos. 10,298, 10,299

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it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements." Rochester Gas and Electric Corp. v. F.P.C., 344 F. 2d 594 (1965). Certainly the waters in the instant case were navigable prior to the construction of the piers, will again be open to unlimited navigation if the piers are ever removed, and most relevantly, are now used in navigation. We would say, therefore, that the waters flowing beneath the piers upon which these accidents occurred are navigable in fact. *Cf.* Nicholson v. Calbeck, 385 F. 2d 221 (5 Cir. 1967).

and 10,323 which affirmed the denial of recovery and remand these cases for the entry of judgments consistent with this opinion.

HAYNSWORTH, Chief Judge, with whom BOREMAN, Circuit Judge, joins, dissenting:

I concur in the affirmance of *Marine Stevedoring Corporation v. Oosting*, in which the longshoreman met his death by drowning, but I respectfully dissent in the other cases, in which the longshoremen died or were injured on the dock. When construing a statute, as we are, it is not for us heedlessly to pursue our own notion of what the congressional judgment should have been or to deal cavalierly with restrictions specified by Congress. Nor do we serve the purpose of eliminating incongruity by transferring it elsewhere in multiplied form and creating a vast area of uncertainty which can only be resolved by extensive litigation.

I had thought there could be little doubt about the intention of the Congress when it enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927. Until then, longshoremen were covered by the compensation act of the state in which they were working as long as they were on the dock, but they had no such protection when they were on the ship or a gangplank. Twice the Congress attempted to extend state compensation statutes to longshoremen when aboard a ship on navigable waters or on a gangplank between such a ship and the dock,[1] a result which would, at least, have put all longshoremen in the same state on a parity, but the Supreme Court, having earlier held that a state compensation act could not reach such a person,[2] struck down each statute as an unlawful delegation of congressional legislative power.[3] It was this

[1] Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

[2] Southern Pacific Co. v. Jensen, 244 U.S. 205; Clyde S.S. Co. v. Walker, 244 U.S. 255.

[3] Washington v. Dawson & Co., 264 U.S. 219; Knickerbocker Ice Co. v. Stewart, 253 U.S. 149.

very limited purpose to secure the benefits of some compensation system to longshoremen while working aboard a ship or while passing between the ship and the dock that prompted the Congress to enact its own compensation act when its attempts to extend the state statutes had been frustrated.

This purpose was clearly expressed in § 3 of the Act,[4] in which compensation protection was extended to injuries "occurring upon the navigable waters of the United States (including any drydock)" the limit of admiralty tort jurisdiction as it was then understood,[5] "and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." The use of the words "upon the navigable waters of the United States" was clearly referable to the prior history of the problem deriving from the Supreme Court's decision in *Southern Pacific Co. v. Jensen, supra* n.2, and the additional caveat that the injury be beyond the constitutional power of the states to compensate would seem to foreclose any doubt about the congressional intention in 1927.[6]

If there is any doubt about the congressional intention in the language of the statute, any notion that dockside

[4] 33 U.S.C.A. § 903.

[5] Crowell v. Benson, 285 U.S. 22, 55; Nogueira v. N.Y., N.H. & H. R.R. Co., 281 U.S. 128, 133, 138; Washington v. Dawson, 264 U.S. 219, 227, 235; State Industrial Commission v. Nordenholt Corp., 259 U.S. 263, 273; Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 59-60; Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co., 208 U.S. 316.

[6] I recognize, of course, that the qualification that the injury be beyond the constitutional reach of state compensation acts may have been inserted for the purpose of demonstrating the congressional intention of remaining within the assumed limits of congressional power, De Bardeleben Coal Corp. v. Henderson, 5 Cir., 142 F. 2d 481, and that it was disregarded in that *tour de force*, which provided a highly practical, but "theoretic[ally] illogic[al]" solution to the problem of the "twilight zone" in which both the federal and the state statutes arguably may be said to apply. Davis v. Department of Labor and Industries, 317 U.S. 249, 259. Since our task is to define congressional intention, however, the words have an obvious and cogent relevance.

injuries were intended to be covered is foreclosed by the legislative history. This was the third attempt to fill the void the Supreme Court's decisions had delineated. Congress sought to do no more. That purpose could hardly have been made more explicit than by the language in the Senate Report No. 973, 69th Cong., 1st Sess., 16, in which it was stated, "injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

It is true, of course, that a remedial statute such as the Longshoremen's and Harbor Workers' Compensation Act should be liberally construed to achieve its purpose, but not to pervert it. This one has been appropriately construed. The liberality with which it has been construed is exemplified by such cases as those holding that a marine railroad is a drydock within the drydock inclusion,[7] that injuries sustained upon or after contact with the water are within the coverage of the statute even though the longshoreman was on the dock before falling or being propelled into the water,[8] by those cases holding the federal act applicable to workers aboard the floating hull of a vessel under construction,[9] or aboard the grounded hull of a decommissioned vessel being dismantled,[10] and to workers engaged in the construction or repair of drydocks,[11] and by

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[7] Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366; Holland v. Harrison Bros. Drydock & Ship Repair Yard, Inc., 5 Cir., 306 F. 2d 369; Western Boat Bldg. Co. v. O'Leary, 9 Cir., 198 F. 2d 409; Maryland Cas. Co. v. Lawson, 5 Cir., 101 F. 2d 732; Continental Cas. Co. v. Lawson, 5 Cir., 64 F. 2d 802. *But see* O'Leary v. Puget Sound Bridge & Drydock Co., 9 Cir., 349 F. 2d 571.

[8] O'Keeffe v. Atlantic Stevedoring Co., 5 Cir., 354 F. 2d 48; Interlake S.S. Co. v. Nielsen, 6 Cir., 338 F. 2d 879; Puget Sound Bridge & Dry Dock Co. v. O'Leary, 260 F. Supp. 260 (W.D. Wash. 1966); Beasley v. O'Hearne, 250 F. Supp. 49 (S.D. W.Va. 1966); Gulf Oil Co. v. O'Keeffe, 242 F. Supp. 881 (E.D. S.C. 1965); Thomsen v. Bassett, 36 F. Supp. 956 (W.D. Mich. 1940). These are the cases that justify the affirmance of the award in Marine Stevedoring Corp. v. Oosting.

[9] Calbeck v. Travelers Ins. Co., 370 U.S. 114.

[10] Boston Metals Co. v. O'Hearne, 4 Cir., 329 F. 2d 504.

[11] Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 4 Cir., 192 F. 2d 968; Travelers Ins. Co. v. McManigal, 4 Cir., 139 F. 2d 949; Travelers Ins. Co. v. Branham, 4 Cir., 136 F. 2d 873.

those other cases which have attempted to bridge the fine line drawing the boundary between the reach of the federal and the state statutes.[12] It is significant, however, that in all of these cases outside of the drydock inclusion, the employee's injuries were suffered on the seaward side of the wharf's edge or resulted from an event occurring when the employee was aboard a ship, whether or not commissioned, or while in the act of passing between the ship and the dock. Strictly dockside injuries suffered on the dock as a result of forces exerted there have not been held to be covered. There has thus been a liberal interpretation of the congressional intention as expressed in the Senate Report, but the cases are consistent with that expression of intention.

To a limited extent some of the cases read out of the statute the limitation that the injury be beyond the power of the state to compensate, but the excision of that proviso was very restricted and partial, and done solely for the purpose of avoiding uncertainties and the loss of rights through an erroneous choice of remedy. Thus the federal statute and the state statute are both allowed to apply in the narrow area of the dock's edge where either statute arguably may be said to apply,[13] but nothing the Supreme Court said in *Calbeck* or elsewhere suggests that, contrary to the

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[12] Davis v. Department of Labor and Industries, 317 U.S. 249; Parker v. Motor Boat Sales, 314 U.S. 244; Michigan Mut. Liab. Co. v. Arrien, 2 Cir., 344 F. 2d 640; Taylor v. Baltimore & Ohio R.R. Co., 2 Cir., 344 F. 2d 281; De Bardeleben Coal Corp. v. Henderson, 5 Cir., 142 F. 2d 481; L'Hote v. Crowell, 5 Cir., 54 F. 2d 212; Dixon v. Oosting, 238 F. Supp. 25 (E.D. Va. 1965); Machillo v. New York Cent. R.R. Co., 200 F. Supp. 805 (S.D. N.Y. 1962); Caldaro v. Baltimore & Ohio R.R. Co., 166 F. Supp. 833 (E.D. N.Y. 1958); West v. Erie R.R. Co., 163 F. Supp. 879 (S.D. N.Y. 1958); Ford v. Parker, 52 F. Supp. 98 (D. Md. 1943); Richards v. Monahan, 17 F. Supp. 252 (D. Mass. 1936).

[13] Moores' Cases, 323 Mass. 162, 80 N.E. 2d 478 (1948), *Aff'd sub. nom.* Bethlehem Steel Co. v. Moores, 335 U.S. 874. *See also* Calbeck v. Travelers Ins. Co., 370 U.S. 114; Baskin v. Industrial Accident Commission, 338 U.S. 854; Davis v. Department of Labor and Industries, 317 U.S. 249.

plainly expressed intention of the Congress, the reach of the federal statute may be extended to injuries which are clearly on the dockside of the line. The *Calbeck* opinion, itself, limits its applicability to injuries on navigable waters within the area delineated by *Jensen, Knickerbocker* and *Dawson,* and by those cases made questionable.[14]

In this scheme of things, of course, there is some incongruity when a member of a stevedoring crew injured on the dock is covered by the state statute while a member of the same crew injured on the ship is covered by the federal, and, if during the day, the same fellow works part of the time on the ship and part of the time on the dock, he passes from one jurisdiction to the other, but he is never without the protection of one statute or the other. The scheme has, at least, the virtue of as large an amount of certainty as could be provided in any division of authority. The edge of the dock is as clear a line as could be drawn. Except in the very rare case, there will be no doubt as to the remedy to be pursued, and doubtful cases need occasion little litigation. If the line is moved shoreward of the dock's edge, short of inclusion of every longshoreman wherever he may be and however he may be injured, it is bound to be vague and fuzzy and a fruitful source of contention and litigation, a circumstance quite inconsistent with the highly desirable certainty which should accompany any system of workmen's compensation.

We, as judges, may think that it would be nice and equitable if all longshoremen were provided compensation protection by the same act, so that each would receive the same benefits from the same administrative agency wherever and however he was injured. That is one of the three alternative theories the majority employs to reach its conclusion, but the "status theory," as opposed to the "situs theory," has been firmly rejected by every court that has ever considered it[15] until now the majority embraces it. There is some support for the theory that coverage of the

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[14] 370 U.S. 114, 126-127.

[15] Travelers Ins. Co. v. Shea, 5 Cir., 382 F. 2d 344; O'Keeffe v. Atlantic Stevedoring Co., 5 Cir., 354 F. 2d 48. *See also* Houser v. O'Leary, 9 Cir., 383 F. 2d 730. *But see* Holland v. Harrison Bros. Drydock & Ship Repair Yard, Inc., 5 Cir., 306 F. 2d 369, 373 n.4.

Compensation Act expanded with the expansion of admiralty's tort jurisdiction,[16] but not for the majority's conclusion that the Compensation Act was initially intended, or later grew, to be coextensive with the admiralty's contract jurisdiction. The phrasing of the statute, as well as its history, shows a rejection, not an adoption, of the suggestion of the Department of Labor that the contract be covered rather than places. Had it been intended to adopt the contract theory, the statutory language "on the navigable waters" could hardly have been more inappropriate for effectuation of that intention. The words, introduced as a substitute for the words, "within the admiralty jurisdiction," require a "situs" approach, as all courts have held or assumed, not a "status" approach.

Next it is said by the majority that the compensation statute was amended by the Admiralty Extension Act of 1948,[17] which extended the admiralty tort jurisdiction to injuries sustained on land, provided they were caused by a vessel on navigable waters. The Ninth Circuit has rejected this theory in a recent case[18] in which the Supreme Court denied certiorari just three months ago.[19] As Judge Watkins pointed out in one of the opinions from which these appeals come,[20] no such intention is evident in the Admiralty Extension Act, its legislative history or the subsequent legislative history of the Compensation Act. The Admiralty Extension Act contains no reference to the Compensation Act, and five days after enactment of the Admiralty Extension Act the Compensation Act was amended to increase the benefits payable,[21] but neither in that amendment or in any of its legislative history is there any

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[16] *See* Michigan Mut. Liab. Co. v. Arrien, 233 F. Supp. 496 (S.D. N.Y. 1964); Boston Metals v. O'Hearne, 1964 A.M.C. 2351 (D. Md. 1963). The issue was not reached on appeal in either case.

[17] 46 U.S.C.A. § 740.

[18] Houser v. O'Leary, 9 Cir., 383 F. 2d 730.

[19] Houser v. O'Leary, 390 U.S. 954.

[20] Johnson v. Traynor, 243 F. Supp. 184, 190-192 (D. Md. 1965). *See also* Travelers Ins. Co. v. Shea, 5 Cir., 382 F. 2d 344, 349-350, *cert. denied* 389 U.S. 1050, approvingly quoting Judge Watkins' reasoning.

[21] 62 Stat. 602.

reference to the Admiralty Extension Act. Bearing in mind the initial deliberate choice of the Congress to substitute the words "upon the navigable waters" as the definition of the covered injuries for the words "within the admiralty jurisdiction,"[22] as was first proposed in 1927 when the Compensation Act was enacted, a holding that the Admiralty Extension Act enlarged the scope of the Compensation Act appears a judicial ukase without legislative support.

Finally, the majority attempts to support its conclusion on the theory that the waters beneath the piers in these cases were navigable, because it either appears or it is assumed that they could be traversed by a skiff or a canoe, which leads them to the conclusion that an injury on the dock above such waters is "upon the navigable waters of the United States." This theory, of course, flies in the face of the settled doctrine that the pier is an extension of the land.[23] It has been specifically rejected by the Fifth Circuit in two very recent cases,[24] in which the Supreme Court denied certiorari only five months ago.[25] Again, it seems to me wholly inconsistent with the congressional mandate which governs us and the clearly expressed congressional intention.

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[22] Had those words been adopted by the Congress, they would furnish some basis for the majority's contract theory; their rejection by the Congress refutes the theory.

[23] Swanson v. Marra Bros., Inc., 328 U.S. 1; Minnie v. Port Huron Terminal Co., 295 U.S. 647; T. Smith & Son, Inc. v. Taylor, 276 U.S. 179; State Industrial Commission v. Nordenholt Corp., 259 U.S. 263; Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co., 208 U.S. 316; The Plymouth, 70 U.S. (3 Wall.) 20; Houser v. O'Leary, 9 Cir., 383 F. 2d 730, *cert. denied* 390 U.S. 954; O'Keeffe v. Atlantic Stevedoring Co., 5 Cir., 354 F. 2d 48; Michigan Mut. Liab. Co. v. Arrien, 2 Cir., 344 F. 2d 640; Hastings v. Mann, 4 Cir., 340 F. 2d 910; Wiper v. Great Lakes Engineering Works, 6 Cir., 340 F. 2d 727; American Export Lines, Inc. v. Revel, 4 Cir., 266 F. 2d 82; O'Loughlin v. Parker, 4 Cir., 163 F. 2d 1011; Johnson v. Marshall, 9 Cir., 128 F. 2d 13; Benedict on Admiralty § 29 (6 ed.); Gilmore & Black, The Law of Admiralty § 6-46 (1957 ed.); Robinson on Admiralty § 11 (1939 ed.).

[24] Nicholson v. Calbeck, 5 Cir., 385 F. 2d 221; Travelers Ins. Co. v. Shea, 5 Cir., 382 F. 2d 344.

[25] Nicholson v. Calbeck, 389 U.S. 1051; McCollough v. Travelers Ins. Co., 389 U.S. 1050.

If the majority's conclusion may be thought to be justified by its statement of the desirability of elimination of incongruity, consider the barrel of incongruities its opinion will create.

A longshoreman working on a quay or wharf at the harbor's edge and beneath which no waters flow but to which a vessel being loaded is tied, would not be covered by the federal statute under the third theory adopted by the majority, though one working nearby upon that portion of a pier which is seaward of high water would be covered. On the same pier a longshoreman would be covered if he was on the seaward side of high water when hurt and not covered if he were not. Under the status theory a longshoreman would be covered wherever he was injured, even several miles from the water on an errand to pick up supplies and however he was hurt, but on the Admiralty Extension Act amendment theory he would not be covered even though working on a pier beneath which waters flow, unless his injury was caused by the vessel or by some equipment appurtenant to the vessel. Is he covered under the majority's conclusion if he is working on a pier beneath which waters flow and not covered if he is working on a quay? Is he covered if his injuries are caused by a shore-based crane engaged in loading the ship, but not covered if he is struck by a switch engine moving empty freight cars? Is he covered when struck down by an automobile on a street while on the way to get supplies from a stevedore's warehouse? Since the contract theory would bring all longshoremen within the coverage of the Act, reference to the other theories suggests that coverage would exist only if the circumstances satisfied all three of them. Would any two suffice?

The majority answers none of these questions. I would not suppose it appropriate that they now undertake to do so, but they illustrate the multitude of incongruities they would substitute for those they seek to eliminate and the extensive uncertainty they introduce in an area in which costly and prolonged litigation ought not to be necessary to ascertain the appropriate remedy.

Congress, if it wishes, may amend the statute to extend its coverage in a rational way to some point of reasonable

certainty. The Court in deciding specific cases can achieve no such comprehensive result, and its attempt to do so is a grave distortion of the statute which seems to me plainly to limit us and to provide for compensation only for injuries suffered arguably on the seaward side of the edge of the dock.

Though the Supreme Court's decision in *Davis v. Department of Labor and Industries, supra* n. 12, "astonished, bewildered and occasionally outraged the legal profession,[26] it served the very practical purpose of eliminating confusion within the defined twilight zone, confusion which the Supreme Court rightly regarded as unfair to employers and employees alike. Now we take the other road to spread confusion where none existed before and to sow vast thickets of controversy and litigation which no system of workmen's compensation can afford.

JUDGMENT

(Filed June 20, 1968)

[R. Vol. III, p. 113.]

United States Court of Appeals for the Fourth Circuit

No. 10,298

William H. Johnson,

Appellant,

v.

John P. Traynor, Deputy Commissioner, U. S. Department of Labor, and Nacirema Operating Co., Inc., a body corporate,

Appellees.

Appeal from the United States District Court for the District of Maryland.

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[26] Gilmore & Black, The Law of Admiralty 349 (1957 ed.).

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,
United States Circuit Judge.

JUDGMENT

(Filed June 20, 1968)

[R. Vol. III, p. 210.]
United States Court of Appeals for the Fourth Circuit

No. 10,299

Julia T. Klosek, widow of Joseph J. Klosek, deceased employee,

Appellant,

v.

John P. Traynor, Deputy Commissioner, U. S. Department of Labor, and Nacirema Operating Co., Inc., a body corporate,

Appellees.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,
United States Circuit Judge.

JUDGMENT

(Filed June 20, 1968)

[R. Vol. III, p. 288.]
United States Court of Appeals for the Fourth Circuit

No. 10,323

Albert Avery,

Appellant,

v.

Jerry C. Oosting, Deputy Commissioner, United States Employees' Compensation Commission, Fifth Compensation District, and Liberty Mutual Insurance Company,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,

United States Circuit Judge.